121-282

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1302.

JOSEPH CHURCH AND CHARLES J. CHURCH, PLAINTIFFS IN ERROR,

vs.

HELEN M. KELSEY, CYRENNES WISE AND ANN WISE HIS WIFE, SIDNEY PHILIP STEVENS, LETTA ANN RULAND, L. T. BROWN AND ROZELLE HIS WIFE, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED DECEMBER 1, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Helen M. Kelsey, Cyrenus Wise and Ann Wise, his wife, in right of said wife; Sidney Philip Stevens, Letta Ann Ruland, L. T. Brown and Rozelle, his wife, in right of said wife; F. T. Medway and Jennie, his wife, in right of said wife; Lillie Stevens, Zelda Stevens, Caleb E. Wright, Samuel Linn, Isaac P. Hand, Henry W. Palmer, C. F. Williams, Elisha Griffin, and J. McKiel Stevens, complainants, and Joseph Church and Charles J. Church, respondents, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of,
2 or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Joseph Church and Charles J. Church, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the fourteenth day of September, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal U. S. Circuit Court, E. D. Pennsylvania.]

SAMUEL BELL,
Clerk of the Circuit Court of the United States in and for the E. Dist. of Penna., in the 3d Circuit.

Allowed by—
ULYSSES MERCUR,
Chief Justice of Supreme Court of Pennsylvania.

1—1302

3 The United States of America to Helen M. Kelsey, Cyrenus Wise and Ann Wise, his wife; Sidney Philip Stevens, Letta Ann Ruland, L. T. Brown and Rozelle, his wife; F. T. Medway and Jennie, his wife; Lillie Stevens, Zelda Stevens, Caleb E. Wright, Samuel Linn, Isaac P. Hand, Henry W. Palmer, C. F. Williams, Elisha Griffin, and J. McKiel Stevens, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Pennsylvania, wherein Joseph Church and Charles J. Church are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the decree rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Ulysses Mercur, chief justice of the supreme court of Pennsylvania, this thirty-first day of August, in the year of our Lord one thousand eight hundred and eighty-six.

ULYSSES MERCUR,
Chief Justice of Supreme Court.

Now, September 8, 1886, copy of above citation served and service accepted.

ISAAC P. HAND.
H. W. PALMER,
Of Counsel for Appellees & Def'ts in Error.

4 Among the records and proceedings in the supreme court of the State of Pennsylvania it is thus contained, to wit:

In the Court of Common Pleas of Lackawanna Co., Sitting in Equity.
Jan'y T., 1883.

Between—

HELEN M. KELSEY, CYRENUS WISE and ANN WISE, His Wife, in right of said Ann; Sidney Philip Stevens, Letta Ann Ruland, L. T. Brown and Rozelle, His Wife, late Rozelle Stevens, in right of said Roselle; F. E. Medway and Jennie, His Wife, in right of said Jennie; Lillie Stevens, Zelda Stevens, Caleb E. Wright, Samuel Linn, Isaac P. Hand, Henry W. Palmer, C. F. Williams, Elisha Griffin, and J. McKiel Stevens, Plaintiffs,
and
JOS. CHURCH and CHAS. CHURCH, Minor Son and Heir of Charlotte Church, Deceased, Defendants. } No. 5.

To the honorable the judges of said court:

Your orators complain and say—

First. That Thomas Griffin, in his lifetime, was seized in his demesne as of fee of and in all that certain messuage and tract of land situate in the city of Scranton, in the county of Lackawanna, bounded

and described as follows, viz: On the east by the Lackawanna
5 river, on the south by land now or formerly of Philo Griffin and H. S. Pierce, on the west by the Delaware, Lackawanna, and Western railroad, and on the north by the land of F. A. Griffin and John Frances, containing forty acres, be the same more or less.

Second. That the said Thomas Griffin died on the 18th day of March, A. D. 1854, having first made his last will and testament, dated the 27th day of March, 1852, which was admitted to probate by the register of Luzerne county on the 3d of April, 1854, the said tract of land upon which the said Thomas Griffin resided at the time of his death being then in the county of Luzerne.

Third. That the said Thomas Griffin in and by his last will and testament devised the tract of land described in the first paragraph of this bill to his daughter, Letta Griffin, subject, however, to an express trust accepted by the said Letta when the said will was made, that she should hold and enjoy the same during the term of her natural life, and that at her death she should convey or devise the one undivided half thereof to the children of her deceased sister, Charlotte Stevens; and that in pursuance of the said devise and the trust to which it was subject, as aforesaid, did enter upon, possess, and enjoy the said tract of land until the time of her death, which occurred on the 27th day of March, 1867.

Fourth. That the said Letta Griffin died without having executed the trust in favor of the children of her sister, Charlotte Stevens, aforesaid, and leaving in possession of the said Joseph Church and Charlotte, his wife, formerly Charlotte Stevens, to whom he had become intermarried, and that after the death of the said Letta Griffin, they, the said Joseph Church and Charlotte, his wife, denied the said trust, and claimed to be the sole owners of said land under deed and devise from the said Letta Griffin.

6 Fifth. That afterwards, to wit, to No. 3, January term, 1872, a bill in equity was filed in the court of common pleas of Luzerne county, of which Lackawanna county then constituted a part, by Griffin Stevens, A. Ruland, and Letta Ann Ruland, his wife, in right of the wife; J. McKiel Stevens, Peter Marsh, and Louisa Marsh, his wife, in right of the wife; Helen Kelsey, Cyrenus Wise, and Ann Wise, his wife, in right of the wife; Sidney Philip Stevens, and Roselle, Lillie, Zelda, and Jennie Stevens, minor children and heirs-at-law of B. Jerome Stevens, deceased, by their next friend, C. Wise, against Joseph Church and Charlotte Church, in which said bill the said plaintiffs therein prayed, *inter alia*, that the defendants therein be decreed to execute and deliver to the plaintiffs deeds for their respective interests in said piece of land; and such further proceedings were had in said suit that afterwards, to wit, on the 5th of February, 1877, the said court made the following final decree therein:

"This cause came on for hearing and was argued by counsel; whereupon, upon due consideration thereof, it is now, February 5, 1877, ordered, adjudged, and decreed that the defendants, by deed duly executed, acknowledged, and filed in the office of the pro-

thonotary, on or before the 20th day of February instant, convey in fee to Letta Ann Ruland an undivided one-sixteenth part of a lot of land situate in the second ward of the city of Scranton, in Luzerne county, bounded and described as follows, viz: On the east by the Lackawanna river, on the south by lands now or formerly of Philo Griffin and H. S. Pierce, on the west by the Delaware, Lackawanna and Western railroad, and north by lands now or formerly of F. A. Griffin and John Frances, containing forty acres, be the same more or less, and being the same land which Thomas Griffin, deceased, by his last will and testament, bearing date the 27th day of March, A. D. 1852, and proved before the register of wills
of Luzerne county on the 3d day of April, 1854, devised to
7 Letta Griffin, excepting, however, out of said conveyance all that part of said land which Letta Griffin, by articles of agreement dated September 27th, 1864, contracted to sell to A. H. Noll, by description as follows: Beginning at a corner in the center of the road leading from Providence to Scranton; thence east by lands of Philo Griffin about four chains and seventy-five links; thence north by lands of Philo Griffin and Letta Griffin far enough to make one acre of land, with a line running parallel with south line to center of said road to the place of beginning, one acre of land, strict measure.

"And it is further ordered, adjudged, and decreed that Charlotte Church, one of the defendants, holds the legal title of the lands herein described (excepting as above), as to one undivided one-sixteenth part thereof in trust for J. McKiel Stevens, as to an undivided one-sixteenth for Griffin Stevens, as to an undivided one-sixteenth part for Louisa Marsh, as to an undivided one-sixteenth part for Ann Wise, as to an undivided one-sixteenth part for Philip Stevens, and as to an undivided one-sixteenth part for the minor children of B. Jerome Stevens, deceased, to wit, Rozelle, Lillie, Zelda, and Jennie Stevens, and that the said defendants, by deed duly executed, acknowledged, and filed in the office of the porthonotary, for delivery to the grantees on or before the 10th day of March next, convey in fee to the *cestui que trusts* herein named the said several undivided one-sixteenth parts of the land herein first described, excepting the one acre contracted, as before stated, to A. H. Noll.

"And it is further ordered that the defendants pay the costs."

Sixth. That aftewards, to wit, on the 1st of February, 1878, the aforesaid decree was amended by the said court, *nunc pro tunc*, as follows:

"In the master's report and in the decree a mistake occurred in finding that the share of each of the heirs of Charlotte Stevens,
8 deceased, in the undivided one-half of the land described in the plaintiffs' bill is one undivided sixteenth. The bill, which in this respect was unquestioned, sets forth the names of said heirs, and the whole case shows, and the master so reported, and the court intended in the decree, that each child of Charlotte Stevens, and the children of a deceased as the representative of their deceased parent, should have an equal undivided share in the undi-

vided one-half of the land described. There were nine children, including Charlotte Church, one of the defendants, and Helen Kelsey, one of the plaintiffs, whose name was by mistake omitted in the decree. It follows that the share of each heir should have been declared to be an undivided one-eighteenth instead of an undivided one-sixteenth of the land held in trust by Mrs. Church. In an action of ejectment Letta Ann Ruland, one of the heirs, recovered in ejectment against the defendants the undivided one-sixteenth of the land described, but by writing filed herewith she consents that the decree be entered that her share or purpart is but one-eighteenth.

"The mistake as to the share or purpart of each of the heirs, the plaintiffs in the bill, having been lately brought to my notice, as well as that of the omission of the name of Helen Kelsey in the decree as to the deed to be made by the defendants, and notice having been given to the solicitors of the defendants of an application to amend the record according to the facts, I have, upon due consideration, concluded to cause the same to be done in order to correct an evident clerical mistake of the master and a like mistake on the part of the court, and also the omission by mistake of the name of Helen Kelsey, one of the plaintiffs, in the decree.

"It is now, February 1, 1878, ordered as of February 5, 1877, that the report of the master as to the share or purpart of the plaintiffs be corrected so that one share or purpart shall be declared to be an undivided one-eighteenth instead of one-sixteenth, and that the decree be amended by striking out the words one-sixteenth
9 wherever they occur in the decree and inserting in lieu thereof the words one-eighteenth; and after the name Philip Stevens, where it occurs in the decree, insert as to an undivided one-eighteenth part thereof to Helen Kelsey; and the said decree is now amended accordingly as of the said 5th day of February, 1877.

"And it is further ordered that the deed made by the defendants, and now on file in the office of the prothonotary, may be withdrawn upon the filing of a deed to the plaintiffs in accordance with the amended decree.

"And it is ordered and decreed that a deed be made in accordance with the amended decree, and that the same be filed in the office of the prothonotary upon the the terms of the order heretofore made, and that the expense of preparing and executing and acknowledging said last-mentioned deed be borne by the plaintiffs."

Seventh. That since the making of the said final decree and the amendment thereof as follows, the said children and grandchildren of Charlotte Stevens, with the exception of Charlotte Church, have jointly conveyed the undivided eight-ninetieths of said land to Caleb E. Wright, Samuel Linn, Isaac P. Hand, and H. W. Palmer; Louisa Marsh has conveyed the undivided four-ninetieths thereof to C. F. Williams, and Griffin Stevens has conveyed the undivided four-ninetieths thereof to Elisha Griffin; that the said Charlotte Church, in her lifetime, acquired the one undivided half of said land by devise in fee from the said Letta Griffin, so that now the said tract of land is held by the following-named persons as tenants in common in fee in the following proportions by the following-named persons (ex-

cepting the lot agreed to be conveyed by Letta Griffin to A. H. Noll, as mentioned in the foregoing final decree): The undivided fifty-nine-tieths by Charles Church, subject to the right of tenancy by the courtesy of Joseph Church; Elisha Griffin, Helen M. Kelsey, S. P. Stevens, C. F. Williams, Letta Ann Ruland, Ann Wise,
10 and J. M. Stevens each four-ninetieths; Rozelle Brown, Jennie Medway, Lillie Stevens, and Zelda Stevens each one-ninetieth; and Caleb E. Wright, Samuel Linn, Isaac P. Hand, and Henry W. Palmer each two-ninetieths.

Eighth. That no deed was ever made by the said Joseph Church and Charlotte Church in pursuance of the said amended decree, but that the said Charlotte Church died on or about the 16th of July, 1880, without having complied with the said amended decree of said court, although she, together with her husband, the said Joseph Church, were notified and required so to do.

Ninth. The said Charlotte Church left a son surviving her named Charles Church, who was at the time of her death, and still is, a minor, and has for his guardian his father, the above-named Joseph Church.

Tenth. That it will be for the advantage of all parties, as it is their right, to have partition made of the said premises according to law, and if it should appear to your honorable court that the said real estate cannot be divided without prejudice to the owners, then it will be to the advantage of all parties that the same should be sold in the manner directed by law.

They therefore pray relief as follows:

1. That a decree of this honorable court may be made parting and dividing the said land hereinbefore described in the decree of the court of common pleas of Luzerne county, sitting in equity, among the parties entitled thereto as their interests are set forth in the foregoing bill of complaint, and for such other and further relief as your orators' case may require and to your honors seem meet.

2. May it please your honors to direct the said defendants,
11 upon service upon them of a copy of this bill, at a certain time and in the manner by the rules of court provided, to come and enter their appearance as defendants therein, and then and there full, direct, and true answer make to all and singular the premises, and to perform and abide such further order, direction, and decree therein as to your honorable court shall seem meet.

ISAAC P. HAND,
HENRY W. PALMER,
SAMUEL LINN,
Solicitors for Complainants.

Answer of Defendants.

In the Court of Common Pleas of Lackawanna County, Sitting in Equity. January Term, 1883.

HELEN M. KELSEY *et al.*
v.
JOSEPH CHURCH *et al.* } No. 5.

1. We admit the statements of the first and second paragraphs of complainants' bill to be substantially correct.

2. We deny that Thomas Griffin in and by his last will devised the land mentioned in the bill to his daughter, Letta Griffin, subject to an express trust, as set forth in the third paragraph of the said bill, and we assert the contrary thereof to be the truth, to wit, that the devise to Letta Griffin by her father, Thomas Griffin, in his last will and testament was absolute, and vested the title in her absolutely, without trust or restriction or limitation of any kind; and that she possessed and enjoyed the said devised premises and treated them as absolutely her own, unaffected by any trust or condition whatever, and as such absolute owner she sold and conveyed the same at her pleasure.

12 3. We admit that there were proceedings in equity, which are partially set forth in the fifth and sixth paragraphs of complainants' bill, but for greater certainty as to the character of the said proceedings we pray leave to refer to the whole record of the said case; and we deny that the said proceedings were and are sufficient to vest any title in the complainants to the land in question, or to authorize them to seek and obtain a partition such as is sought in their bill.

4. As to what conveyances may have been made among the parties named in the seventh paragraph of the bill we are not sufficiently informed to answer; but we deny that any of the parties thus named are tenants in common in fee with us, the defendants, of the lands mentioned in the bill, or of any part thereof, or that they are in anywise entitled or have shown by their bill any title or right to partition as sought in their bill.

5. And we further aver that we are seized of the full legal title to the premises mentioned in the bill, by virtue of a *bona fide* purchase for a valuable consideration without notice of any trust of any kind, by virtue of which possession was taken as early as the year A. D. eighteen hundred and sixty-seven, and has been continuously held ever since, by our ancestors and ourselves; and we claim the same benefit of this defence as if we had interposed the same by way of plea.

And we further aver that the complainants have not in and by their bill set forth such a case as is within the jurisdiction of a court of equity, and that it is the right of defendants to have, hold, and maintain their titles to the lands in question regularly at law, a right guaranteed to them both by the Constitution of the United States and the constitution of this State.

13 And we therefore pray to be hence dismissed with our reasonable costs in this behalf wrongfully sustained.

A. RICKETTS,
Counsel for Defendants.

LACKAWANNA COUNTY, *ss:*

Joseph Church, being duly sworn, says that the facts set forth in the foregoing answer are true so far as set forth of his own knowledge, and so far as set forth on information and belief that he verily believes them to be true.

JOSEPH CHURCH.

Sworn and subscribed this 7th day of July, A. D. 1883, before—
[SEAL.]
A. D. DEAN,
Notary Public.

Evidence.

Testimony taken before E. Merrifield, examiner, in above-stated case.

Now, May 29, 1884, in accordance with due notice to the parties, E. Merrifield, examiner in above case, met the parties at the court-house in Wilkes Barre.

H. W. Palmer, I. P. Hand, and Judge Linn for plaintiffs; A. Ricketts for defendants.

It is admitted that Mrs. Charlotte Church died intestate July 17th, 1880, leaving a survivor, one son, Charles J. Church, for whom Joseph Church has been duly appointed guardian.

It is further admitted that the facts set forth in the 7th paragraph of the plaintiffs' bill, so far as the same relates to conveyances made by the children and grandchildren of Charlotte Stevens, is true.

14 Also that the facts set forth in the 8th paragraph are true.

The plaintiffs offer in evidence the record in No. 3, January term, 1872, in equity, in common pleas of Luzerne county, between Griffin Stevens, A. Ruland, Letta Ann Ruland, his wife, in right of the wife; J. McKiel Stevens, Peter Marsh and Louisa, his wife, in right of the wife; Helen Kelsey, Cyrenus Wise and Ann Wise, his wife, in right of the wife; Sidney Philip Stevens and Rozelle, Lilly, Zelda, and Jenny Stevens, minor children and heirs-at-law of B. Jerome Stevens, by their next friend, C. Wise, against Joseph Church and Charlotte Church.

Defendants object to this offer of evidence for the reason that the record upon its face is a proceeding not within the jurisdiction of the court sitting in equity, and is simply a proceeding *coram non judice* and of no validity.

The record is received.

For all purposes of this case it is *argued* that the paper books used in the supreme court in the above-stated case, so far as they contain the record of the said case, shall be used in this case in place of the official record or an exemplification thereof (this agreement, how-

ever, not to preclude either party from using the original record in case other party shall deem it necessary).

JOSEPH CHURCH sworn:

I will be 57 years of age June 1st, and am defendant in this bill. The tract of land described in plaintiffs' bill is situate in the city of Scranton, Pa., bounded on the east by Lackawanna river, about 30 rods wide on the river; it runs back 175 rods; it is nearly a parallelogram in shape; this is supposed to be coal land; portions
15 of it is of some value for town lots. The chief value of the property is for the minerals contained in the land. There are several buildings on it—maybe thirty or forty houses and barns. There are four or five veins of coal that probably extend under the whole of it; there are two top veins beside that don't amount to much. The coal on all sides, except a small portion belonging to [the] Philo Griffin estate, is leased by mining companies.

The testimony on the part of the plaintiffs is closed.

It is agreed upon the part of the defendants to close *his* testimony by the first day of August next, to have the same force and effect as though rule had regularly issued by the court and had been served.

July —, 1884, parties appear and proceed with defendants' testimony.

Defendants offer in evidence deed—Letta Griffin to Charlotte Church—dated 18 February, 1867, for tract of land in dispute, acknowledged before E. Leach, Esq., same day; recorded April 1, 1867, in Luzerne county, D. B. 117, page 166, &c.; consideration, $1,000.

Offered for purpose of showing defendant is *bona fide* purchaser of land in dispute for valuable consideration, to be followed by evidence that the same was taken without notice of any trust whatever, and possession taken under it and been maintained ever since, exclusive and adverse against plaintiffs and all the world.

Objected to by plaintiffs as irrelevant and immaterial in this issue, and because the title claimed under the foregoing deed was set up and adjudicated upon in the equity proceeding heretofore given in evidence.

JOSEPH CHURCH recalled:

Am one of the defendants in this suit; lived in Wisconsin
16 prior to 1860; married Charlotte Church January 6, 1862, at Providence, this county; went back to Wisconsin to live; took her with me; took Letty Griffin out there to live with me January 1, 1863.

Q. What occurred with regard to her business affairs while Letta Griffin lived there with you in Wisconsin?

MR. Palmer asks what is the purpose of the question.

Answer of counsel: The purpose is to show the circumstances under which the above-mentioned deed was made and the consideration therefor, and that in pursuance of the said conveyance possession was delivered to the grantees of the land in question, and

that they have held the same—*i. e.*, the said Charlotte Church and her successors in the title—ever since, holding the same exclusively and adversely to the present plaintiffs and all the world, and still thus hold the same.

Objected to by plaintiffs as irrelevant and immaterial; 2d, arrangements between witness and Letta Griffin in the absence of the plaintiffs is not evidence.

A. Soon after we got there—three or four months—she received a good many dunning letters. She owed quite a large amount, and they kept coming. She finally said she had got to do something about her debts. She said if I would come back and live with her in Pennsylvania and pay her debts—she told me what they were—and support her through her lifetime and pay the legacies of a will she had made, that she would deed us the property. She told me about what it was and the contents of the will she had made and amount of debts. I concluded to do so and did so. I came back with her in fall of 1864. I took possession, furnished the house, and commenced to pay her pressing debts. I went back to Wisconsin, left my family here; was gone three or four months at a time.

17 I sent a man by name of William Toombs from there to do the work and see to the family and things—do the work and dig cellar for the barn. I paid miners to dig coal, sold coal, paid the miners for doing it; built a barn and done other improvements; made contracts for leasing and selling; received the rents and paid for all expenses. I paid her debts, to amount of between $3,000 and $4,000, to parties. I could name most of it. She lived to 20 March, 1867, at which time she died. I buried her respectably and paid every debt she owed or that I ever heard of, and I have offered to pay the legacies of the will. She lived with me on this property in dispute until she died. I paid off her debts to Zeikel Griffin, $900; to Polly Stevens, $1,100—it might have been the reverse; to Sally Ann Heerman about $160; to D. W. Griffin about $100; to Sam. Tripp, $50; to John R. Fordham about $30; to Seybold & White a bill paid; taxes to N. Fitch for about three years before I came there; paid Robert Lackey $20 to $30, besides quite a good many store debts I cannot recall. These were the principal debts. The above deed was made in pursuance of this arrangement.

Q. State what knowledge or notice of any kind either you or your wife, Charlotte Church, in any way had at any time previous to this said arrangement and the execution of this deed of any trust or liability on the part of Letta Griffin in favor of these plaintiffs.

A. I never heard a word or a lisp from no living person, nor did my wife, to my knowledge, of anything in their favor, except that they were to be paid a certain amount of legacies in the will she had made. I took possession in pursuance of this arrangement and have kept it ever since. The plaintiffs in present bill have never had possession, together with myself and my wife, of the land in question, either at time of filing this bill or at any other time.

Cross-examination:

Am the same Joseph Church who was defendant in the
18 equity proceeding No. 3, January term, 1872, in equity; was a witness in that case; was present in court when the issues on that case were tried; was present when the case of Letta Ann Ruland was tried for an undivided interest in this land. I do not know whether I was a witness; think I have testified to same facts now sworn to before.

Redirect by defendants:

The plaintiffs were all living in this county at the time of these transactions, except Helen Kelsey.

WELLS BENJAMIN sworn:

Live in Providence, Scranton city; lived near Church's from 1864 to 1870; had dealings with Church; think in 1865; he mined quite a large amount of coal on the property in question, and I had a team haul coal for him; think he shipped here to Scranton; Joseph Church paid me for doing it.

JOHN FLYNN sworn:

Lived near Joseph Church's from 1864 to 1870, in this city; think in August or September, 1865, I mined about a thousand tons of coal for Mr. Church out of this property; Church paid me, I think; it looked as though coal had mined there before; there was coal in stock there when I started.

Cross-examination:

Think I have seen Letta Griffiin; think she did not pay me for mining the coal.

Above testimony objected to as irrelevant.

ANTHONY CLARK sworn:

Lived at Sand Bank, this city, in 1865 and '6; I hauled coal for Joseph Church from this property; Joseph Church paid me for all I done.

19 Objected to as immaterial.

PHILIP MCDONALD sworn:

Lived in Pine Brook, this city, in 1865 and '66; Joseph Church hired me to break coal on the property where he now lives; he paid me for all the work I done for——

Objected to as immaterial.

FLORENCE LYNCH sworn:

Lived in Providence from 1864 to 1866; worked for Joseph Church on this property about that time; worked on the farm for him; some in '65; worked about three years; Church paid me for my work; Letta Griffin was living with Church in the same house.

Q. Did she ever say anything to you about who had the possession and control of the property?

Objected to—1st, as immaterial; 2nd, the declarations of Letta Griffin are not evidence in this issue.

A. She did; I was digging post holes one day and Miss Griffin came to me; asked me what I was doing there; I told her Mr. Church was going to build a fence right along here; then she said it wasn't much of her business, but she had a good man to superintend the work when she had Joseph Church, and she thanked God she had such a man in the family.

Cross-examination:

Was a witness before in the lawsuit between these parties; was digging post holes right by Church's barn; did not tell this story before; first I ever spoke of it; never was asked it; never spoke of it from that day till this; begun to think of it the other day when I was subpœnaed; did not know what I was to say until I came here.

20 LUDWIG VANSTORK sworn:

From 1865 to '67 I lived in Providence, near Church's; think about 150 rods. I bought coal of Church in 1865 from this property. Letta Griffin was living there in the house she built. I had conversation with her as to who had control and possession of the property. Church built a barn in '65 or '66, and I was there at the raising. She told me after they had got the barn up; think she called me to the house; said Church had been sick for some days, hardly able to get about, and she had given the property all up to him. She had no other way to do, she said; she was in debt and no way to pay her debts; he had gone on and paid her debts and she had given him possession and charge of the whole thing. I still live in Providence and have ever since. Church has had possession of this property all the time I lived there and down to the present time; have never since that time known anybody else to have possession except him.

All above testimony objected to as incompetent and irrelevant.

Cross-examination:

Letta Griffin lived there on the property until she died. Church's wife lived there, after I went there, until she died.

ISAAC DEAN sworn:

Have lived in Providence for fifteen years; lived in Abington previous; was down once or twice a week; have known Church since he was a little boy; have seen him oftener since he came from Wisconsin, and ever since he has lived on the property in dispute; still lives there; he has used the property as his own; he has built a good deal on it; a barn, one or two coal-breakers, a brick house,
and some slaughter-houses; has mined coal and sold it; has
21 leased to different parties and mined by the day. I knew Letta Griffin; she lived with Church after he came from

Wisconsin. I know some of the plaintiffs—two of the Stevens, Mrs. Ruland, Mrs. Wise; they were living in this county, so far as I know; Mrs. Wise lived about town here; none of these plaintiffs, that I ever knew of, had possession of this property along with Joseph Church and wife.

Objected to as incompetent and irrelevant.

Cross-examination:

I have been called in this case before. I never had an interest in this property; had a mortgage on it in the shape of a deed—a portion of it. I don't know that I own anything. I turned over everything to a trustee. Thomas Livey is my trustee for benefit of my creditors; don't recollect whether this mortgage was scheduled and put in.

It is agreed that Robert H. Lackey, if produced, also John R. Fordham, who were creditors of Letta Griffin, would swear that Joseph Church paid them.

Same testimony objected to as immaterial.

Admitted if A. H. Winton was produced he would swear that he leased a portion of this property from Joseph Church and wife in spring of 1867, before Letta Griffiin died, namely, three or four acres for base-ball ground.

Objected to as irrelevant.

Defendants offer in evidence Thomas Griffin's will, dated 27th March, 1852; probated April 3, 1854; letters testamentary granted to Letta Griffin and David R. Randall 4th April, 1854; recorded in register's office of Luzerne county, Will Book "B," page 610, &c. Offered for purpose of showing title and right of possession in defendants.

22 Objected to because the title under this will was adjudicated and settled finally and conclusively in the equity proceeding given in evidence by the plaintiffs.

Offers will of Letta Griffin, dated 22d September, 1862, probated 24th April, 1867. Letters testamentary granted 24th April, 1867, to Theodore Vanstork and Joseph Church. Recorded in register's office, Luzerne county, in Will Book B, page 314, &c.

Objected to as incompetent *and* reasons above stated.

Defendants also offer the records of the following ejectments, of which it is agreed that certified copies of the continuance docket entries may be used instead of exemplication.

Above evidence objected to as incompetent and immaterial.

I hereby certify the foregoing to be the testimony taken before me.

E. MERRIFIELD,
Examiner.

Among the records of the court of common pleas of Luzerne county, State of Pennsylvania, it is, *inter alia*, thus contained:

Continuance Docket Entry, of May Term, 1867.

GRIFFITH STEVENS, J. M. STEVENS, S. P. STEVENS, ROSELLA Stevens, Lillie Stevens, — Stevens, Jennie Stevens, Minor Children of J. B. Stevens, Deceased, by their next Friend, S. P. Stevens; Abram Ruland and Letty Ann Ruland, His Wife, in right of said Wife; Cyrenus
23 Wise and Ann Wise, His Wife, in right of said Wife; Peter Marsh and Louisa Marsh, His Wife, in right of said wife, and Helen Kelsey,
vs.
JOSEPH CHURCH and CHARLOTTE CHURCH. } No. 173.

$1.90 paid by att'y. Received, 21 Sept., 1868, of C. Wise, $4.35, Sheriff Vanleer's costs—W. Fenner, for sh'ff; prot., $17.85; com., .50; rev., .50; sh'ff, 4.35; att'y, 3.00; Prot. Seibel p'd express, .50; do., 4.90; def'ts' bill, 367.13; pl'ffs', 12.72; Prot. S., add'l, 1.90.

Summons in ejectment for a lot of ground situate in 2d ward, Scranton borough, Luzerne county and State of Pennsylvania, bounded and described as follows, viz: On the east [by the] Lackawanna river, on the south by land of Philo Griffin and H. S. Pierce, west by the Delaware, Lackawanna and Western railroad, and north by land of F. A. Griffin and John Frances, containing forty acres, more or less. Exit 15 April, 1876. Summoned.

Now, 13 July, 1867, rule is entered on part of plaintiffs to take depositions on ten days' notice. (Copy exit.)

August 26, 1867, defendants plead not guilty.

Now, 18 May, 1868, rule is entered on the part of plaintiffs to take depositions on ten days' notice.

Now, May 16, 1868, on filing affidavits and on motion in open court, the court permit the record to be amended by striking out name of S. M. Stevens, — Stevens, Abram Ruland and Letty Ann Ruland, his wife, in right of said wife; Cyrenus Wise and Ann Wise, his wife, in right of said wife; Peter Marsh and Louisa Marsh, his wife, in right of said wife, and Helen Kelsey, they having been included as plaintiffs by mistake. (See C. M.)

Now, 16 November, 1869, depositions filed on part of plaintiffs. (See C. M.)

24 Now, 9 May, 1870, defendant enters a rule to take depositions on ten days' notice. (See files.)

Continued October 4, 1870, at costs of defendant. (See T. L.)

Now, 27 December, 1870, depositions filed.

Now, 27 December, 1870, issue joined and jury being called came, to wit, John Hart, David S. Vail, Samuel Vannetter, Lewis McKeel, Nathaniel Goss, R. C. Drum, Jacob Gress, C. B. Durland, David Fairchild, John Mitchell, Charles F. Herman, and Chester Fuller, who all being duly sworn to well and truly try, &c., do say they find in favor of the defendant. Verdict rendered 3d January, 1871.

During trial defendants file eight and plaintiffs file five sealed bills of exceptions.

Now, 2d January, 1871, upon application of plaintiffs' counsel, court grant rule to show cause why new trial shall not be granted. (See C. M.)

Now, 7 January, 1871, reasons for new trial filed. Same day rule is entered on part of plaintiffs to take depositions on five days' notice.

Received, 14 October, '71, of Prot. Seibel, refunded on defendants' bill after retaxation, two hundred thirty-nine $\frac{65}{100}$ ($235.69).

WRIGHT & HAND.

Received, 14 October, '71, of Proth'y Seibel, one hundred and twenty-seven $\frac{48}{100}$ dollars ($127.48), costs of defendants.

C. L. LAMBERTON,
Att'y for Defendants.

Received, 30 September, 1871, of Wright & Hand, attorneys for plaintiffs, three hundred and ninety-two and $\frac{48}{100}$, balance of cost as taxed in this case, except plaintiffs' bill.

R. V. LEVERS,
Pro Prot.

25 Now, 7 January, 1871, on motion of plaintiffs' counsel in open court, permission is given to file additional reasons for new trial at any time during the day with the prothonotary. (See C. M.)

Now, 9 January, 1871, court grant rule to show cause why rule to file additional reasons on the part of the plaintiffs shall not be stricken off. (See C. M.)

Now, 10 January, 1871, the court file a paper giving reasons for refusing to strike off reasons for a new trial filed by plaintiffs, of the 7 January, 1871, and explaining the conduct of his honor, Judge Dana, on the premises. (See C. M. and files.)

Now, 25 July, 1871, by opinion of court filed, rule for new trial made absolute upon conditions stated therein. (See opinion filed.)

Same day charge of court filed.

Now, 30 August, 1871, additional order of Judge Elwell, president judge, filed as follows: And it is further ordered that the said consent to the reading of the verdict in evidence be filed in writing by the first day of October next, and that the costs, which are for the plaintiffs to pay as the case now stands, be paid by them by the same time (unless the time be hereafter enlarged), upon cause shown, otherwise the rule for a new trial will be considered as discharged. (See files.)

Now, 6 September, 1871, by paper filed, plaintiffs' counsel except to the opinion and conditions imposed by the court in granting a new trial in the above case, and consent that the verdict set aside may be given in evidence on the next or any subsequent trial, as stipulated, reserving the right to take any legal exceptions thereto when the same is offered. (See files.)

26 Now, 26 September, 1871, defendants' bill of costs filed. (See files.)

Now, 30 September, 1871, exceptions to defendants' bill filed and prothonotary notified not to pay out the same. (See files.)

Now, 4 October, 1871, plaintiffs enter rule to retax defendants' bill of costs in this case before the prothonotary on five days' notice. (See files.) Cost exit.

Now, 12 October, 1871, defendants' bill of costs retaxed before prothonotary. By agreement of parties all costs charged in bill previous to December term, 1870, are stricken out and the sum of $36.40 is deducted from the bill as filed for December term, 1871, being overcharged for witnesses named therein. (See papers filed.)

February 5, 1877, plaintiffs take nonsuit. (See T. L. No. 1.) J. D., No. 32.

Continuance Docket Entry, of August Term, 1867.

ABRAM RULAND and LETTY RULAND, His Wife, in Right of the Wife,
vs.
JOSEPH CHURCH and CHARLOTTE CHURCH. } No. 586.

$1.90 p'd by att'y. Debt. Land. Prot., $13.52; com., 50; sh'ff' 4.35; jury, 4.00; att'y, 3.00; pl'ff B., 317.88; 343.25, int.; *hab. fa. al. fi. fa.*, 116, Jan. T., 1870, .90; stayed sh'ff, 25; copy of record, 1.50' cost S. C., 10.00; op. ch'g's, .30; *al. hab. fa. al. fi. fa.*, 56, Aug. term' 1870, .90; sat. sh'ff, 12.44.

27 Summons in ejectment for a lot of ground situate in the 2d ward of Scranton city, Luzerne county, Pa., bounded and described as follows, viz: On the east by the Lackawanna river, on the south by land of Philo Griffin and H. S. Pierce, west by the Delaware, Lackawanna and Western railroad, north by land of F. A. Griffin and Jno. Francis, containing forty acres, more or less. Exit 26th July, 1867. Summoned.

18th November, 1867, defendants plead not guilty.

Now, 18th May, 1868, rule is entered on part of plaintiffs to take depositions on ten days' notice. (See files.)

Now, 7th May, 1869, defendants add plea of statute of limitation and contract for want of time. (See trial list.)

Now, 15th November, 1869, issue joined and jury called and came, to wit, Albert McAlpine, A. J. Pringle, John Cope, James McDermott, Sidney Eicke, S. H. Dodson, Samuel A. Kensey, I. M. Hicks, P. H. Moyles, E. G. Carpenter, Amos Saxe, and William Belles, who all being duly sworn to well and truly try the issue joined, &c., do say that [they] find for the plaintiff the one undivided sixteenth part of the land claimed, excepting the one acre described in contract from Letta Griffin to Almira H. Noll, dated 27th September, 1864, as shown in evidence, for which latter we find in favor of the defendants. (See C. M.)

Now, 23d November, 1869, plaintiffs file sheriff's receipt for four dollars, jury fee in above case, and thereupon judgment. (See files.) J. D., No. 18.

Now, 24th November, 1869, copy of charges to the jury filed. (See files.)

Now, 29th November, 1869, writ of error from supreme court filed, returnable second Monday of March, 1870. (See files.)

28 Now, 26th January, 1870, defendant enters rule to take depositions on ten days' notice. (See files.)

Now, 17th May, 1870, record and remittitur from the supreme court filed and judgment affirmed. (See files.)

20th June, 1870, sheriff's receipts of Joseph Church, $360.00, to apply on wit. (See *al. hab. fa.*)

8th July, 1870, sheriff's receipts of Joseph Church, $9.74, in full of balance of costs on writ. Loose receipt given. (See *al. hab. fa.*)

25th August, 1870, Wright & Harrington, attorneys for plaintiffs, receipt of sheriff $337.08, plaintiffs' bill of costs, amount paid prothonotary, jury fee, attorney fee, S. C. costs, and express paid. (See *al. hab. fa.*)

Continuance Docket Entry, of August Term, 1867,

SIDNEY STEVENS
vs.
JOSEPH CHURCH and CHARLOTTE CHURCH. } No. 587.

$1.90 pd. by atty; prot. ph., $14.35; com., 50; sh'ff, 4.35; Prot. S., 6.35; Prot. T., 3.85; att'y, 3.00.

Summons in ejectment for a lot of ground situate in the 2d ward of the city of Scranton, Luzerne county, Pa., bounded and described as follows, viz: On the east by Lackawanna river, on the south by land of Philo Griffin and H. S. Pierce, west by Delaware, Lackawanna and Western railroad, north by land of F. A. Griffin and John Frances, containing forty acres, more or less. Exit 26th July, 1867. Summoned.

18th November, 1867, defendants plead not guilty.

29 Now, 18th May, 1868, rule is entered on part of plaintiff to take depositions on ten days' notice. (See files.)

Now, 17th May, 1869, defendants add plea of statute of limitation. (See T. L.)

Now, 16th November, 1869, depositions filed on part of plaintiff. (See C. M.)

Now, 26th January, 1870, defendants enter rule to take depositions on ten days' notice. (See files.)

October 24th, 1870, continued at costs of defendants on the ground of absence of witnesses. (See T. L.) Continued. (See T. L., April T., 1875.)

Now, 9th October, 1876, on filing affidavit court grant rule to show cause why nonsuit shall not be stricken off. (C. M., No. 2.)

9th October, 1876, nonsuit entered upon application of plaintiff's counsel. (See T. L., No. 2. J. D., No. 32.)

Now, 28th March, 1877, rule discharged. (See argument list.)

Continuance Docket Entry, of August Term, 1867.

PETER MARSH and LOUISA MARSH, His Wife, in Right of the Wife,
vs.
JOSEPH CHURCH and CHARLOTTE CHURCH. } No. 588.

$1.90 p'd by att'y; prot. ph., $14.35; com., 50; sh'ff, 4.35; Prot. S., 6.35; Prot. T., 3.85; att'y, 3.00.

Summons in ejectment for a lot of ground situated in the
30 2d ward of the city of Scranton, Luzerne county, Pa., bounded and described as follows, viz: On the east by the Lackawanna river, on the south by lands of Philo Griffin and H. S. Pierce, on the west by the Delaware, Lackawanna and Western railroad, north by land of F. A. Griffin and John Frances, containing forty acres, more or less. Exit. 26th July, 1867. Summoned.

18th November, 1867, defendants plead not guilty.

Now, 18th May, 1868, rule is entered on part of plaintiffs to take depositions on ten days' notice. (See files.)

Now, 7th May, 1869, defendants add plea of statute of limitation. (See files.)

Now, 16th November, 1869, depositions filed on part of the plaintiffs. (See C. M.)

Continued October 24, 1870, at costs of defendants. (See T. L.)

Now, 6th April, 1875, continued on application of plaintiffs and at their costs. (See T. L., April T., 1875.)

Now, 9th October, 1876, on filing affidavit, court grant rule to show cause why nonsuit entered in this case shall not be taken off. (C. M., No. 2.)

October 9th, 1876, nonsuit entered upon application of plaintiffs' counsel. (See T. L., No. 2. J. D., No. 32.)

Now, 28th March, 1877, rule discharged. (See argument list.)

Continuance Docket Entry, of August Term, 1867.

HELEN KELSEY
vs.
JOSEPH CHURCH and CHARLOTTE CHURCH. } N. 589.

31 $1.90 pd. by att'y; prot. ph., $14.35; com., 50; sh'ff, 4.35; Prot. S., 6.35; Prot. T., 3.85; att'y, 3.00.

Summons in ejectment for a lot of ground situated in 2d ward of Scranton city, Luzerne county, Pa., bounded and described as follows, viz: On the east by the Lackawanna river, south by land of Philo Griffin and H. S. Pierce, on west by Delaware, Lackawanna, and Western railroad, north by land of F. A. Griffin and John Frances, containing forty acres, more or less. Exit 26th July, 1867. Summoned.

November 18th, 1867, defendant pleads not guilty.

Now, 18th May, 1868, rule is entered on part of plaintiff to take depositions on ten days' notice. (See files.)

Now, 7th May, 1869, defendants add plea of statute of limitation. (See C. M.)

Now, 16th November, 1869, depositions filed on part of plaintiff. (See C. M.)

Continued, October 24th, 1870, at costs of defendants. (See O. L.)

Continued. (See T. L., April term, 1875.)

Now, 9th October, 1876, on filing affidavit, court grant rule to show cause why nonsuit entered in this case shall not be taken off. (C. M., No. 2.)

Now, 9th October, 1876, nonsuit entered upon application of plaintiff's counsel. (See T. L., No. 2.)

Now, 20th March, 1877, rule discharged. (See argument list.)

32 *Continuance Docket Entry, of August Term*, 1867.

CYRENUS WISE and ANN WISE, His Wife, in Right of the Wife, *vs.* JOSEPH CHURCH and CHARLOTTE CHURCH. } No. 590.

$1.90 p'd by att'y; prot. ph., $14.35; com., 50; sh'ff, 4.35; def'ts' bill, 22.50, at April T., '75; Prot. S., 635; Prot. T., 3.85; att'y, 3.00

Summons in ejectment for a lot of ground situate in the 2d ward of Scranton city, Luzerne county, Pa., bounded and described as follows, viz: On the east by the Lackawanna river, on the south by lands of Philo Griffin and H. S. Pierce, west by the Delaware, Lackawanna and Western Railroad Company, north by lands of F. A. Griffin and John Frances, containing forty acres, more or less. Exit 26th July, 1867. Summoned.

November 18th, 1867, defendants plead not guilty.

Now, 18th May, 1868, rule is entered on the part of plaintiffs to take depositions on ten days' notice. (See files.)

Now, 7th May, 1869, defendants add plea of statute of limitation. (See T. L.)

Now, 16th November, 1869, depositions filed on part of plaintiffs. (See C. M.)

Continued, October 24th, 1870, at cost of defendants. (See T. L.)

Now, April 6th, 1875, continued on application of plaintiffs and at their costs. (See T. L., April T., 1875.)

33 Now, 9th October, 1876, on filing affidavit, court grant rule to show cause why nonsuit entered in this case shall not be taken off. (C. M., No. 2.)

Now, 9th October, 1876, nonsuit entered upon application of plaintiffs' counsel. (See T. L., No. 2.) J. D., No. 32.

Now, 28th March, 1877, rule discharged. (See argument list.)

Received, May 23d, 1877, of C. Wise, plaintiff, by hands [of] I. P. Hand, fifty-three dollars, all costs taxed in above case, except $1.90 paid by attorney on entry of suit. Loose receipt given.

W. FENNER,
Pro Prot.

Mr. C. Wise paid Ald. C. A. Zeigler same time $12.95, balance [of] M. J. Philbin's fees in this case, as per receipt before me. Prot. Barber should refund that amount to Mr. Wise.

February 8th, '78.

D. L. PATRICK,
Attorney for H. N. Patrick, Assignee of M. J. Philbin.

Received, February 8th, 1878, of Prot. Barber $12.95, paid in by C. Wise as M. J. Philbin's fees, and now returned to him by direction of Mr. Patrick.

ISAAC P. HAND,
Attorney for C. Wise.

Received, 16th March, 1877, from Prot. Barber $4.35, balance [of] Sheriff Vanleer's fees.

THOS. QUICK,
Executor,
Per PATRICK, *Ag't.*

Continuance Docket Entry, of August Term, 1867.

J. M. STEVENS
vs.
JOSEPH CHURCH and CHARLOTTE CHURCH. } No. 591.

34 $1.90 p'd by att'y; prot. ph., 14.35; com., 50; sh'ff, 4.35; Prot. S., 6.35; Prot. T., 3.85; att'y, 3.00. Received May 5, 1874, M. J. Philbin's fees by check of I. P. Hand. Horatio N. Patrick, for Philbin.

Summons in ejectment for a lot of ground situate in second ward of Scranton city, Luzerne county, Pennsylvania, bounded and described as follows, viz: On the east by the Lackawanna river, on the south by lands of Philo Griffin and H. S. Pierce, on the west by Delaware, Lackawanna and Western railroad, on north by lands of F. A. Griffin and John Frances, containing forty acres, more or less. Exit 26 July, 1867. Summoned.

November 18, 1867, defendants plead not guilty.

Now, 18th May, 1868, rule is entered on part of plaintiff to take depositions on ten days' notice. (See files.)

Now, 7 May, 1869, defendants add plea of statute of limitations. (See T. L.)

Now, 16 November, 1869, depositions on part of plaintiff filed. (See C. M.)

Now, 8 June, 1870, rule is entered on part of plaintiff to take depositions on ten days' notice. (See files.)

Continued October 24, 1870, at costs defendants. (See T. L.)

Continued. (See T. L., April term, 1875.)

Now, 9 October, 1876, on filing affidavit court grant rule to show cause why nonsuit entered in this case shall not be taken off. (C. M., No. 2.)

October 9, 1876, nonsuit entered on application of plaintiff's counsel. (See T. L., No. 2. J. D., No. 32.)

Now, 28 March, 1877, rule discharged. (See arg. list.)

35 *Bill in Equity.*

In Court of Common Pleas of Luzerne Co., Sitting in Equity.

GRIFFIN STEVENS, A. RULAND, and LETTA ANN RULAND, His Wife, in Right of the Wife; J. McKiel Stevens, Peter Marsh and Louisa Marsh, His Wife, in Right of the Wife; Helen Kelsey, Cyrenus Wise and Ann Wise, His Wife, in Right of the Wife; Sidney Philip Stevens, and Rozelle, Lillie, Zelda, and Jennie Stevens, Minor Children and Heirs-at-law of B. Jerome Stevens, Deceased, by Their next Friend, C. Wise, Plaintiffs,

vs.

JOSEPH CHURCH and CHARLOTTE CHURCH, Defendants.

To the honorable the judges of said court:

Your orators complain and say:

1. That Thomas Griffin died on or about the 18th day of March, A. D. 1854, seized in his demense as of fee of all that certain lot, piece, or parcel of land situate in the second ward of the city of Scranton, bounded and described as follows, viz: On the east by the by the Lackawanna river, on the south by lands of Philo Griffin and H. S. Pierce, west by the Delaware, Lackawanna and Western railroad, and north by the land of F. A. Griffin and John Frances, containing forty acres, be the same more or less, it being part of a larger tract of land.

2. That in and by his last will and testament, bearing date the 27th day of March, A. D. 1852, and duly admitted to probate
36 by the register of Luzerne county on the 3d day of April, A. D. 1854—a copy of which is hereto attached and marked "Exhibit A"—he devised the said piece or parcel of land, *inter alia*, to his daughter, Letta Griffin.

3. That Charlotte Stevens, a daughter of Thomas Griffin, died in the lifetime of said Thomas Griffin, leaving surviving her children as follows: Griffin Stevens, Letta Ann, now intermarried with A. Ruland; J. McKiel Stevens, Louisa, now intermarried with Peter Marsh; Helen, widow of Orvil Kelsey, deceased; Ann, now intermarried with Cyrenus Wise; Sidney Philip Stevens, Guilford Dudley Stevens, B. Jerome Stevens, and Charlotte, now intermarried with Joseph Church; that Guilford Dudley Stevens died unmarried, without issue; B. Jerome Stevens died in July, 1864, leaving surviving Rozelle Stevens, Lillie Stevens, Zelda Stevens, and Jennie Stevens; that Charlotte Church is the defendant in this bill, and the other parties named are plaintiffs.

4. That Letta Griffin died on the 23d day of March, A. D. 1867, and in and by her last will and testament, bearing date September, 22, A. D. 1862, and duly admitted to probate by the register of Luzerne county on the 24th day of April, A. D. 1867—a copy of which is hereto attached and marked "Exhibit B"—she devised the said piece of land, *inter alia*, to Charlotte Church.

5. That an undivided one-half of the said piece or parcel of land

was the share of the heirs of Charlotte Stevens, deceased, daughter of Thomas Griffin, in the estate of said Thomas Griffin; that Thomas Griffin, in his lifetime, intended to secure to them by his will the the said portion of his estate.

6. That Letta Griffin, daughter of Thomas Griffin, and de-
37 visee under his will, expressly and by verbal undertaking with the testator, before and at the time of making his will, agreed with and promised him that if he would devise to her the said piece or parcel of land, an undivided one-half of which was the share of the heirs of her sister, Charlotte Stevens, deceased, to have during her life, she would leave the same to the children of Charlotte Stevens after her (Letta's) death; that, relying upon the faith of her promise, he did devise the said piece of land to her, as mentioned in item one of said will. See "Exhibit A."

7. That after the making of said will said Thomas Griffin at different times proposed to change his will and give the heirs of his daughter Charlotte their portion of said land, but Letta induced her father to leave the will unchanged by repeating her promise to him that she would fulfill his intentions with regard to her sister Charlotte's children, and leave them their portion in said land after her death; that, relying upon the faith of her promise, he did not change his will in favor of the heirs of Charlotte Stevens, deceased.

8. That upon the death of said Thomas Griffin, Letta Griffin became seized of said lot of land, to hold an undivided one-half thereof in fee and the other undivided one-half in trust for the heirs of Charlotte Stevens, deceased, to be conveyed to them after her (Letta's) death.

9. That Letta Griffin, not regarding her said several promises, but intending to defraud the said plaintiffs, in and by her last will and testament devised the whole of said real estate to Charlotte Church, one of the heirs of Charlotte Stevens, deceased.

10. That Letta Ann Rutland, wife of A. Rutland, has recovered an undivided one-sixteenth of said land, excepting the one acre described in contract from Letta Griffin to Almira H. Noll, dated 27th
38 September, 1864—a description of which is hereto attached and marked "Exhibit C"—in action of ejectment, No. 586, August term, 1867, in the court of commons pleas of Luzerne county.

11. That the only evidence upon which a recovery was had in said action was the proof by witnesses to sustain the charges made in the preceding sections of this bill.

12. That said action being brought upon an equitable title, the verdict and judgment entered therein is final and conclusive upon the parties.

13. That the defendants are and have been in the occupancy and possession of said lot, or piece, or parcel of ground since the 23d day of March, 1867; that the said land is coal land, and that the defendants have been engaged in mining coal on said premises.

Prayer.

1. As to Letta And Ruland the prayer is that the defendants may be decreed to execute and deliver to her a deed for the interest recovered in said action of ejectment.

2. As to the other plaintiffs the prayer is that Letta Griffin and Charlotte Church may be declared and decreed to be trustees for said plaintiffs, and that the defendants may be decreed to execute and deliver to the plaintiffs deeds for their respective interests in said piece of land.

3. That the defendants may render an account of the coal mined by them and by their direction, and of all moneys received as coal rental, and of all the rents and profits arising from said land since the 23d of March, 1867, and that they be restrained by injunction from mining coal on said land.

39 4. That the plaintiffs may have such other and further relief as the nature of the case may demand and require.

C. E. WRIGHT,
A. HAND,
D. C. HARRINGTON,
Attorneys for Plaintiffs.

"EXHIBIT A."

Copy of Will of Thos. Griffin. Probated Ap'l 3, 1854.

In the name of God, amen. I, Thomas Griffin, of the township of Providence, county of Luzerne, and Commonwealth of Pennsylvania, farmer, do make and publish this my last will and testament, hereby revoking and making void all former wills by me at any time heretofore made.

And first, I direct that my body be decently interred, and that my funeral be conducted in a manner corresponding with my estate and situation in life. And to such worldly estate as it hath pleased God to entrust me with, I dispose of the same as follows:

First. I direct that all my just debts and funeral expenses be paid, as soon after my decease as possible, out of the first moneys that shall come into the hands of my executors from any portion of my personal estate.

Item 1. I give and bequeath unto my faithful daughter Letta the following described piece or portion of land upon which I now reside: Beginning on the bank of the Lackawanna river, several feet south of the lane fence, so as to form a straight line from said bank, passing through a cherry stub, and touching a point sixteen feet north of the barn standing out in the lot from the public highway, said point to intersect a line parallel with the west end of said barn; thence along the west end of said barn and the yard attached
40 to the corner thereof; thence from said yard corner to the south corner of the horse barn; thence across the public highway to the corner of the board fence; thence in a straight line to a large chestnut tree at the fence corner on south bank of a little stream running through my farm; thence in a straight line to the

railroad at a point ranging with the south side of my woodland, lying west of the railroad; from thence along said railroad to lands of Dr. Silas B. Robinson; thence by the lands of said Robinson to the Lackawanna river and the place of beginning And, further, I give and bequeath unto my said daughter Letta the dwelling-house in which I now reside, and the shed or horse barn on the opposite side of the road, and likewise the hog-pen. The said daughter Letta is to have the said lands and tenements in fee simple forever without any entailment whatever. I also give to my faithful daughter Letta her choice of horses, two cows, ten sheep, and all of my household furniture.

Item 2. I give and bequeath unto my son Benjamin the place, piece, or portion of land he now has in his possession; and I further give and bequeath unto him all the land lying between the said farm so in his possession and the Lackawanna river, and he is to have the same in fee simple, without any entailment, it being situated on the south side of my farm, and on the east side of the public highway leading from Carbondale to Wilkes Barre through the village of Hyde Park, and on which said parcel of land he has erected a dwelling-house.

Item 3. I give and bequeath unto my son Philo the following-described piece or parcel of land, viz: Beginning at the same point on the bank of the Lackawanna river that I did in describing the parcel to my daughter Letta, and running to the same points until we get to the point on the said railroad; thence across said railroad and along the south side of my woodland to the west line
41 of my farm; thence south along the said west line of my farm to the land belonging to the heirs of my deceased son Philip; thence east along the north line of the said heirs to the public highway leading from Wilkes Barre through the village of Hyde Park to Carbondale; thence in a line parallel with the north line of the parcel of land bequeathed to my son Benjamin, and extending to the bank of the Lackawanna river; thence north along the Lackawanna river to the place of beginning.

Item 4. I give and bequeath unto my son Durlin the following-described piece or parcel of land, viz: All that portion of land situated, lying, and being between the parcels bequeathed to Benjamin and Philo, the same extending east from the said Carbondale and Wilkes Barre public highway to the Lackawanna river.

Item 5. I also give and bequeath unto my sons, Benjamin, Philo, and Durlin, to be held and occupied by them jointly, or to be divided equally between them, as they may agree, the following-described piece of land viz: All that piece or parcel of woodland lying west of the railroad and bequeathed to my daughter Letta, and bounded on the south by the parcel bequeathed to my son Philo.

Item 6. I reserve that portion of the land lying between the public highway leading from Carbondale to Wilkes Barre and the proposed plank road from the point where the said roads diverge, south as far as the parcel of land bequeathed to my son Benjamin, with a view of disposing of the same for building lots; but in case any

part of the above reservation should not be disposed of at my decease, then my said daughter Letta and my sons Philo and Durlin will take it, as the same is included within the items of their boundaries.

And furthermore, in publishing this my last will and testa-
42 ment, I wish it particularly understood why I have made no provision herein for my other children not herein named; it is because I have previously given them their portions of my estate.

Item 7. My express will and desire is that if any difference or dispute, question, or controversy, shall arise or happen concerning any gift, bequest, or other matter or thing in this my will, the same shall be referred wholly to the award, order, and determination of my esteemed neighbors, James S. Kennedy and Joseph Chase, with power to choose an umpire; but if they or either of them should not be able or willing to act in the premises, then I do direct that my son Benjamin and daughter Letta shall each appoint an arbitrator or arbitrators, with the same power of choosing an umpire, and what they, or a majority of them, shall order, direct, or determine therein shall be binding and conclusive to and in all and every person or persons therein concerned.

Item 8. And, lastly, I do nominate and appoint my said daughter Letta and David R. Randall to be the executors of this my last will, hereby revoking all other wills, legacies, and bequests by me heretofore made, and declaring this and no other to be my last will and testament.

In witness whereof I have hereunto set my hand and seal this twenty-seventh day of March, 1852.

THOMAS GRIFFIN. [SEAL.]

Signed, sealed, declared, and published by the above-named Thomas Griffin as and for his last will and testament in presence of us, who, at his request and in his presence, have subscribed our names as witnesses thereto.

The name of "Ira Tripp" erased before signing.

WM. MOORE.
D. P. BARTON.

43 LUZERNE COUNTY, *ss:*

I, Charles H. Hay, register for the probate of wills in and for said county, certify that the foregoing is a true copy of the last will and testament of Thomas Griffin, deceased, as this day proven and registered aforesaid in Will Book B, page 610, &c.

In witness whereof I have hereunto set my hand and affixed my official seal, at Wilkes Barre, this 3d April, A. D. 1854.

CHAS. H. HAY, *Register.*

"EXHIBIT B."

Will of Letta Griffin, Dec'd. Probated Ap'l 24, 1867.

1. Letta Griffin, of the borough of Providence, being of sound mind, memory, and understanding, do make and publish this my last will and testament, in manner and form following, to wit:

1. It is my will, and I do order and direct, that all my just debts and funeral expenses be duly paid and satisfied as soon as conveniently can be after my decease.

2. I order and direct that grave-stones or monuments be placed at the graves of my father and mother, Thomas Griffin and Anna Griffin, and that of my own, the cost of each to be about two hundred dollars, the same to be done as soon after my decease as conveniently can be.

3. I direct that the sum of fifty dollars be paid by my executors to Griffin Stevens, son of my sister Charlotte.

4. I direct that the sum of one hundred dollars be paid by my executors to Joseph M. Stevens, son of my sister Charlotte.

5. I direct that the sum of one hundred dollars be paid by my executors to Letta Ann Ruland, daughter of my sister Charlotte.

44 6. I direct that the sum of fifty dollars be paid by my executors to Ann Wise, daughter of my sister Charlotte.

7. I direct that the sum of one hundred dollars be paid to Sidney P. Stevens by my executors, the same to be deducted out of a note that I now hold against him, the said Sidney being another son of my said sister Charlotte.

8. I direct that the sum of one dollar be paid to Louisa Marsh by my executors. Having previously given her a lot of land, I deem this bequest as making a suitable remembrance of her, she being another daughter of sister Charlotte.

9. I direct that the sum of one hundred dollars be paid by my executors to Jerome B. Stevens, son of sister Charlotte.

10. I direct that the sum of fifty dollars be paid to Helen Kelsey by my executors, she being a daughter of sister Charlotte.

11. I direct that the sum of one hundred dollars be paid to Durlin Griffin, my brother.

12. It is my will and wish that Charlotte Church, the youngest daughter of my said sister Charlotte, should have the residue of all my property, real, personal, and mixed; and I do give and bequeath the same to her, subject to the payment of the foregoing bequests and debts.

13. It is my desire that in case of the death of any of the foregoing devisees or legatees before my decease that the legacy directed to be paid to such should be paid to their heirs.

14. I do nominate, constitute, and appoint my esteemed friend, Theodore Von Storch, and Joseph Church, husband of Charlotte Church, my niece, my executors of this my last will and testament, fully authorizing and empowering them to do and perform

45 all things necessary to close up my estate, such as making deeds, and all things needful.

15. I have been thus particular in naming all the children of my sister Charlotte, because it was the desire of my father that I should do so.

In witness whereof I have hereunto set my hand and seal the twenty-second day of September, 1862.

LETTA GRIFFIN. [SEAL.]

Signed, sealed, declared, and published by the above-named Letta Griffin as and for her last will and testament in the presence of us, who, at her request and in her presence, have subscribed our names as witnesses thereto.

N. COTTRILL.
JAMES S. KENNEDY.

"EXHIBIT C."

Contract of Letta Griffin with A. H. Noll.

All that certain messuage or lot of land situate in the borough of Providence, county of Luzerne, and State of Pennsylvania, bounded and described as follows: Beginning at a corner in the center of the road leading from Providence to Scranton, thence east by lands of Philo Griffin about four chains and seventy-five links; thence north by lands of Philo Griffin and Letta Griffin far enough to make one acre of land, with a line running parallel with south line to the center of said road; thence along said road to the place of beginning, said lot to contain one acre of land, strict measure, excepting and reserving unto the said first party, her heirs and assigns, by such legal terms as shall be sufficient in law, all the coal lying beneath the surface of the herein-described lot of land, and the right to dig, mine, and remove the same, but in no case nor in anywise shall this be construed to affect or in any manner whatever
46 injure the surface of said lot, nor shall there be any coal or other minerals removed from under the dwelling or green houses which shall be erected thereon.

Date of contract, 27th day of September, 1864.

Consideration, $1,000.

Answer, Plea, and Demurrer of Joseph Church and Charlotte Church.

In — Common Pleas. Jan. T., 1872. In Equity.

GRIFFIN STEVENS, A. RULAND, and LETTA ANN RULAND, His Wife, in Right of the Wife; J. McKiel Stevens, Peter Marsh and Louisa Marsh, His Wife, in Right of the Wife; Helen Kelsey, Cyrenus Wise and Ann Wise, His Wife, in Right of the Wife; Sidney Philip Stevens and Rozelle, Lillie, Zelda, and Jennie Stevens, Minor Children and Heirs-at-law of B. Jerome Stevens, Deceased, by their next Friend, C. Wise, Plaintiffs,

vs.

JOSEPH CHURCH and CHARLOTTE CHURCH, Defendants.

No. 3.

The joint answer of Joseph Church and Charlotte Church, the defendants, to the bill of plaintiffs.

To the honorable the judges of said court:

We, Joseph and Charlotte Church, the defendants above named, to the bill of complaint of said plaintiffs, or to so much thereof as we are advised is material or necessary for us to answer to, reserving to ourselves all benefit or advantage of exceptions to the many errors, uncertainties, and other imperfections in the said complainants' bill of complaint contained, answering, say—

47

1. It is true that Thomas Griffin died on or about the 18th day March, A. D. 1854, seized in his demesne as of fee of all that certain lot of land, situate in the second ward of the city of Scranton, containing about forty acres, and supposed to be correctly described in the first article of the plaintiffs' bill, but the same was part and parcel of a larger tract of land lying within the said city of Scranton, whereof said Thomas Griffin was seized in fee, a correct map or diagram of which said larger tract we herewith exhibit to the honorable court, and pray that the same may be taken as part of this our answer. See "Exhibit A."

2. True it is that in and by his last will, duly executed and proved, as alleged by the complainants, Thomas Griffin devised about forty acres of his said premises to his daughter, Letta Griffin, in fee-simple forever, without any entailment whatever, the boundaries whereof are particularly described in said will and indicated on the aforesaid diagram, a correct copy of which said will we now exhibit to the honorable court, and pray that the same may be received as part of our answer. See "Exhibit B."

3. It is true that Charlotte Stevens, a daughter of Thomas Griffin, died in the lifetime of said Thomas Griffin, and we are informed and believe that the names of her children and grandchildren are correctly set forth in the third article of the plaintiffs' bill. Charlotte Church, one of the defendants in this suit, was the youngest child of her mother, the said Charlotte Stevens, who died in childbed, when the said Charlotte Church was but a few days old. The other parties named in complainants' third article are the plaintiffs in this bill.

48 4. The death of Letta Griffin, the date of her last will, and the probate thereof are correctly stated in the fourth article of the bill, and Charlotte Church is made her residuary devisee of all her property, real, personal, and mixed, not previously disposed of by her said will, and the land in controversy passed to and vested in said Charlotte Church in fee-simple by virtue of said residuary devise. A correct copy of the said last will is herewith exhibited to the honorable court as part of our answer, and we pray it may be accepted as such. See "Exhibit C."

5. The allegations contained in the fifth article of the bill are denied as utterly untrue. The plaintiffs do not show to the honorable court when, where, or how an undivided one-half of the land in controversy became or was made the share of the heirs of Charlotte Stevens. So far from its being true that Thomas Griffin in his lifetime intended to secure them by his will the said portion of his estate, it is true that he manifested his intention in the mode pointed out by law in Pennsylvania to give to his "faithful daughter Letta, the said lands and tenements in fee-simple forever, without any entailment whatever."

6. We deny that Letta Griffin expressly and by verbal undertaking with the testator, Thomas Griffin, before and at the time of making his will, agreed with and promised him that if he would devise to her the said piece or parcel of land, to have during her life, she would leave the same to the children of Charlotte Stevens after her (Letta's) death, and it is not true that the said Thomas Griffin made the absolute devise which is expressed in his will, relying upon the faith of any such falsely alleged promise.

7. We deny all and singular the assertions contained in the seventh clause of the complainants' bill.

49 8. It is true that upon the death of Thomas Griffin, Letta Griffin became seized of said lot of land, but it is not true that she was to hold an undivided one-half thereof in fee, and the other undivided one-half in trust for the heirs of Charlotte Stevens, deceased, to be conveyed to them after her (Letta's) death; but, on the contrary, she held the whole of said land under her father's will, absolutely, in fee-simple, "to do with it as she pleased."

9. The charge of fraudulent violation of promises imputed to Letta Griffin in the tenth clause of the bill is unfounded and untrue.

10. It is true that Letta Ann Ruland, wife of A. Ruland, recovered in an action of ejectment, in the common pleas of Luzerne county, a verdict and judgment for an undivided sixteenth of the land in controversy, excepting as therein mentioned, but has never taken or attempted to take possession of said premises in pursuance of such recovery. The defendants are and have been in the occupancy and possession of said lot, as alleged in the first clause of the plaintiffs' thirteenth article, but they do not admit that it is coal land, or that they have been engaged in mining coal on the said premises.

11 and 12. We know upon what kind of evidence the said verdict was obtained, and upon the same evidence in the suit of Griffin, Stevens, and other heirs of Charlotte Stevens for their shares of the

same land the verdict was rendered for the defendants, but we do not know upon what proofs the plaintiffs expect to sustain the charges made in the several sections of their bill. And that suit, Ruland and wife against us, having been adjudged an action at law in ejectment for land one verdict and judgment do not conclude the right, and another action at law will be brought by us against the said Ruland and wife if they ever execute a writ of possession.

50 Having now answered in detail the several specific charges of the said bill, we take leave, in further answer to said bill, to submit a connected narrative of the circumstances out of which this controversy arises. Thomas Griffin owned a farm in Providence township, Luzerne county, containing about — acres, and lived thereon and reared a family of eight children, to wit: Isaac, Philip, Charlotte (intermarried with Joseph Stevens), Letta, Benjamin, Philo, Durlin, and Thomas. Portions of this farm were conveyed by deed during the lifetime of Thomas Griffin to his sons Isaac, Philip, Thomas, and Benjamin, and to his son-in-law, Joseph Stevens; he conveyed a farm in Greenfield township, in said county, besides furnishing an outfit to his daughter Charlotte upon her marriage to the said Joseph Stevens. When Mrs. Stevens was upon her death-bed, eight or ten days after the birth of her daughter Charlotte (now Mrs. Church), she called her father and her sister Letta to her bedside and committed the infant to Letta to rear, and requested her father, if there was anything coming from his estate to her, that it should be given to Letta to compensate her for rearing the baby, to which Letta assented, and took the child away to her father's house, nursed, reared, and educated her to years of womanhood. Charlotte then married Joseph Church, and they removed to and settled in Rock county, State of Wisconsin, where he engaged himself in a prosperous business. During these years Letta remained unmarried, lived at home, and took care of her father and mother, who were becoming old and feeble. Her mother was stricken with paralysis, and was bed-fast for several years before her death, receiving from Letta all the attention and nursing her helpless condition required. After the death of her mother, Letta continued to keep house for and take care of her father, ministering to all his wants, until the time of his death, at 86 years of age. After his death, Letta became very poor; the land was unproductive,

51 and she was getting well stricken in years, and as a means of subsistence she took township paupers to board. In the extremity of her poverty, some of the family suggested to her to send for her foster child to come home and take care of her, and she sent for us, and we gave up our home and business in Wisconsin and removed back to Providence, Luzerne county, and took charge of Letta, and nursed and kept her until she died, and then we gave her Christian burial.

When Thomas Griffin came to make his will he employed David R. Randall, Esq., a competent lawyer, and went with him upon the premises, showed him how he had divided his farm, and how he wanted the residue to be devised. The will was prepared with the greatest care and circumspection, but on no point was the testator

so solicitous as upon the share to be given to Letta. He knew what he had done for the Stevens family and his other children, and then and there stated it to Mr. Randall, and he knew that Letta was the only child who had staid with him and his wife in the infirmities of their old age. He took especial pains, therefore, to secure to Letta her share absolutely, without trusts, entailments, or in his own expressive language, without any "hang-nail." He knew Letta's affection for all her sister's (Charlotte Stevens') children, and he meant she should be at liberty to use the land given her as she pleased. Referring himself entirely to her discretion, which he had learned from long experience he could trust, he vested in her the power of disposing of the land given her in the most absolute terms his scrivener could employ, which declarations he frequently reiterated up to the time of his death. She remained in possession under her father's will, exercising acts of ownership, conveying lots, reserving coal and minerals, settling land damages, and conveying rights of way, without challenge or doubt of her title. In fact, had sold and deeded to Edmund Griffin all of it but one-half of an acre.

52 These positive acts, done under the eyes of the present plaintiffs, asserting absolute title in her, called forth no suggestion that Letta was merely their trustee as to one-half of the land. One of the plaintiffs, Mrs. Louisa Marsh, accepted a deed from Letta for a portion of the land, and placed the same on record, reserving to Letta the minerals under the lands. When she came to die, Letta Griffin—the "faithful Letta," as her venerable father called her—exercised her right of disposition in the manner prescribed by law. She gave legacies to the Stevens children, and the residue of her estate to Charlotte Church, and went to her rest quite unconscious of any trust or violations of any promises to her father, and unconscious, also, that the world contained anybody to impute fraud to her.

But there came an action at law by the Stevens heirs for half of the land devised to Mrs. Church; that suit was discontinued before trial as to all the plaintiffs except as to Griffin Stevens and part of the minor children of Jerome B. Stevens, and six several suits of ejectment were instituted in the names, respectively, of the rest of the Stevens heirs. One of these six suits—that in the name of Ruland and wife—resulted, as before stated, in a verdict for the plaintiffs, and the judgment therein was affirmed in the supreme court. See 14 P. F. Smith, p. 433.

It will be seen from the opinion of the court in that case that the ground was taken that, under existing statutes in Pennsylvania, the common-law action of ejectment would not lie to enforce a parol trust, such as was set up by the plaintiffs, and that the plaintiffs' remedy was in equity, but the court overruled this objection, and held that an action at law would lie.

The case of Griffin Stevens and others against us next came on for trial in the — common pleas of Luzerne county, when the same evidence the plaintiffs had recovered upon in the former suit was again relied upon. The jury found a verdict for us, which the court set aside, not because of any mistrial, but because it was an equi-

table ejectment, and the plaintiffs must have a second chance
53 of recovery. Terms were imposed and subsequently assented to by plaintiffs.

These suits are all still depending, and now, without an offer to discontinue any of them, this bill in equity is filed to enforce the alleged trust, and the plaintiffs assert that it is to be made out upon the same evidence that was given in the above-named suits.

Such, may it please your honors, is a succinct narrative of this extraordinary litigation. Having made considerable sacrifices to give to Letta Griffin the support and assistance which her advancing age required, and to which her unselfish life so well entitled her, but which no one of the plaintiffs was ready to render, we suppose that we are entitled to enjoy the property so fairly devised to us without being harassed by litigation that is doubly vexatious.

The Joint Plea of Joseph Church and Charlotte Church to the Bill of Complaint of Griffin Stevens et al.

The defendants, for plea to the whole of said bill of complaint, say that in the term of May, 1867, to No. 173, Griffin Stevens, Rozelle Stevens, Lillie Stevens, Jennie Stevens, and Zelda Stevens, minor children of B. Jerome Stevens, by their next friend, S. P Stevens; Abram Ruland and Letta Ruland, his wife; Sidney P. Stevens, Peter Marsh and Louisa Marsh, his wife; Helen Kelsey, Cyrenus Wise and Ann Wise, his wife, and J. McKiel Stevens, instituted their action of ejectment in this honorable court against the defendants in the complainants' bill mentioned, and claiming such shares and proportions thereof, and such rights and interests in said land therein mentioned and described as they now claim by their present bill, and asking for recovery against these defendants for the same interest and with the same effect as the said complainants now pray by their present bill.

That subsequently, to wit, on the 16th day of May, 1868,
54 all the complainants aforesaid, excepting Griffin Stevens and Rozelle Stevens and Jennie Stevens and Lillie Stevens and Zelda Stevens, minor children of B. Jerome Stevens, by their attorney, D. C. Harrington, Esq., discontinued the said action of ejectment.

That afterwards, in the term of August, 1867, to No. 586 of this honorable court, Abram Ruland and Letta Ruland, his wife, in right of the wife, instituted their action of ejectment against the defendants; that to No. 587, of the same term, Sidney P. Stevens instituted his action of ejectment against the defendants; that to No. 588, of the same term, Peter Marsh and Louisa Marsh, his wife, in right of the wife, instituted their action of ejectment against the defendants; that to No. 589, of the same term, Helen Kelsey, instituted her action of ejectment against the defendants; that to No. 590, of the same term, Cyrenus Wise and Ann Wise, his wife, in right of the wife, instituted their action of ejectment against the defendants; and that to No. 591, of the same term, J. McKiel Stevens instituted his action of ejectment against the defendants; all

of which several records we now produce in open court, and make them part of this our plea, the said ejectments being for fractional interests of the same land, which, aggregated, are identical with the land claimed by the plaintiffs' bill of complaint, and which they aver is to be supported by the same evidence, and the defendants duly appeared to the said several actions of ejectment.

That one verdict and judgment was had for the plaintiffs in the case of Ruland and wife, to No. 586, of the terms aforesaid, and that upon like evidence one verdict was rendered for the defendants in the case of Griffin Stevens *et al.*, to No. 173, of May term aforesaid, upon which a new trial has been ordered by this honorable court upon terms which have been assented to by the plaintiffs therein; yet, excepting as aforesaid, the said suits and the several proceedings, as these defendants aver, now remain depending and of record in this honorable court, the same being yet undetermined
55 and undismissed; all which said several matters and things these defendants do aver and plead the said former suits or actions and the several proceedings in the said former suits in bar to the said complainants' bill, so far as the same relates to the plaintiffs in said suits mentioned, and pray they may be hence dismissed with costs, &c.

The defendants further plead that the ejectment suit of Ruland and wife against Church and wife was and is subject to the general rule of law that one verdict and judgment in ejectment do not conclude the right, and the plaintiffs in said suits have executed no writ of possession, nor obtained possession of any part of the premises in controversy, and that the same have remained, and still are, in the peaceable possession of the said defendants, and the defendants' right to bring a second action of ejectment cannot be exercised whilst the possession remains in them unchanged. A bill in equity is not an *habere facias possessionem*, nor a substitute for it, nor can it be made so by judicial action.

And for further plea the defendants aver that after trial of the ejectment suit of Griffin Stevens *et al.* against the said defendants, of No. 173, May term, 1867, in the — common pleas of Luzerne county, for a part of the premises in controversy, and a verdict for defendants therein, the court, on motion of plaintiffs' counsel, set aside said verdict and granted a new trial upon terms and conditions as follows:

1. That the plaintiffs' counsel file a stipulation that the verdict now set aside may be given in evidence on the next trial, or any subsequent trial, to have the same effect only as a former verdict between the same parties in an action at law.

2. By an additional order filed it is further ordered that the said consent to the reading of the verdict in evidence be filed in
56 writing by the first day of October next (1871), and that the costs, which are for plaintiffs to pay, as the case now stands, be paid by them by the same time, unless the time be hereinafter enlarged upon cause shown; otherwise the rule for a new trial will be considered as discharged.

To which several conditions the plaintiffs assented, as will fully

appear by the record of said suit, which the defendants now bring into court and show to your honors and make part of this our bill; which said record the defendants aver is a legal bar to the right of plaintiffs named in said suit to abandon their said proceedings, still pending and undetermined, and to file a bill in equity for the same cause of action.

The Joint Demurrer of Joseph Church and Charlotte Church, the Defendants, to the Bill of Complaint of Griffin Stevens et al.

The defendants demur to so much of the plaintiffs' bill as prays that the defendants may be declared and decreed to be trustees of an undivided interest of the land in controversy for Griffin Stevens, J. McKiel Stevens, Peter Marsh and Louisa Marsh, his wife; Helen Kelsey; Cyrenus Wise and Ann Wise, his wife; Sidney Philip Stevens, Rozelle Stevens, Lillie Stevens, Zelda Stevens, and Jennie Stevens, and that the defendants may be decreed to execute and deliver to them, and also to Letta Ann Ruland, deeds for their respective interests in said piece of land, for the reasons particularly set forth:

1. That the plaintiffs have a full, complete, adequate, and certain remedy at law, to which they resorted, as set forth in our aforesaid pleas.

2. That the prayer of the plaintiffs in their bill is to recover the possession of the land therein mentioned upon a claim of title, arising purely out of disputed matters of fact, alleging fraud in obtaining and executing a will fit to be tried and determined by a jury and not appropriate to the equity jurisdiction of the courts.

57 3. There is no ground laid in the charging part of the plaintiffs' bill for discovery or an account.

4. That the relief, as prayed for by the plaintiffs in their bill, would deprive the defendants of their right of trial by jury.

5. The bill of plaintiffs, as filed, being for the possession of land, is an ejectment bill, and cannot be sustained.

Wherefore, and for divers other good causes of demurrer appearing in said bill, these defendants demur to the said bill, and to all the matters and things therein contained, and pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

JOSEPH CHURCH,
CHARLOTTE CHURCH.

Joseph Church and Charlotte Church, being duly sworn, do depose and say that the facts set forth in the foregoing answer, plea, and demurrer, upon their personal knowledge, are just and true and the facts alleged upon information and belief they believe to be true, and that the said demurrer is not for purposes of delay, and that the said plea is true in point of fact, and that the said plea is not interposed for delay.

JOSEPH CHURCH,
CHARLOTTE CHURCH.

Sworn and subscribed before me this thirtieth day of April, A. D. 1872.

[NOTARIAL SEAL.] A. H. WINTON,
Notary Public.

GEO. W. WOODWARD,
CHAS. L. LAMBERTON,
A. H. WINTON,
Solicitors for Defendants.

58 IV.

Report of Master.

In the Court of Common Pleas of Lackawanna County, Sitting in Equity. January Term, 1883.

HELEN M. KELSEY and Others
vs.
JOSEPH CHURCH and CHARLOTTE CHURCH, Minor Son and Heir of Charlotte Church, Deceased. } No. 5.

To the honorable the judges of said court:

The undersigned, having been appointed master in chancery in the above-stated cause, respectfully submits the following report:

The plaintiffs allege in their bill that they are tenants in common with the defendants of about forty acres of land in the city of Scranton, in this county, described in their bill, and pray for a partition.

The defendants in their answer deny that any of the plaintiffs are tenants in common in fee with them, the defendants, of the lands mentioned in the bill, or of any part thereof, or that they are in anywise entitled —, and they aver that they, the defendants, are seized of the full legal title to said premises, and that under this title they have been in continuous possession by their ancestor and themselves, since the year 1867.

The plaintiffs, by replication filed, have joined issue on the matters alleged in the answer.

From the various allegations in the bill and answer, so far as they are admitted by the pleadings, and from the evidence taken by the examiner, the master finds the following facts:

59 First. Thomas Griffin, in his lifetime, was seized of about forty acres of land in the city of Scranton, fully described in the plaintiffs' bill, and, being so seized, he died 18th March, 1854, having first made his will, dated 27th March, 1852, which was admitted to probate 3d April, 1854, by the register of wills of Luzerne county, the said land, upon which said Griffin resided at the time of his death, being then in the county of Luzerne.

Second. The said Thomas Griffin, by his said will, devised said land to his daughter, Letta Griffin, relying upon an express promise made by her, by which she undertook and agreed with him that if he would devise the said land to her she would hold the same dur-

ing her life, and would leave or secure to the children of Charlotte Stevens, her deceased sister, the undivided half thereof.

Third. Said Charlotte Stevens, a daughter of said Thomas Griffin, died in the lifetime of said Thomas, leaving surviving her ten children, namely: Griffin Stevens, Letta Ann, intermarried with A. Ruland; J. McKiel Stevens, Louisa, now intermarried with Peter Marsh; Helen, widow of Orvil Kelsey, deceased; Ann, now intermarried with Cyrenus Wise; Sidney Philip Stevens, Guilford Dudley Stevens, B. Jerome Stevens, and Charlotte, since intermarried with Joseph Church.

Guilford Dudley Stevens died unmarried and without issue. B. Jerome Stevens died in 1864, leaving four children: Rozelle, now intermarried with L. T. Brown; Lillie, Zelda, and Jennie, now intermarried with F. E. Medway.

Charlotte Church died 17th July, 1880, leaving to survive her her husband, Joseph Church, and one child, Charles, who are the present defendants.

The other heirs of Charlotte Stevens, or their vendees, are the plaintiffs.

60 Fourth. In 1864 said Joseph Church took possession of said premises at request of said Letta Griffin, and, with his family, has lived upon them ever since. Said Letta lived with him on said premises until her death. She was embarrassed by debts which he paid. He took entire charge of the property and seems to have managed it as though it were his own, making valuable improvements upon it, both before and after her death.

By deed dated and acknowledged 18th February, A. D. 1867, and recorded the 1st April, 1867, in the recorder's office for Luzerne county, the said Letta Griffin conveyed the land to said Charlotte Church for the consideration of one thousand dollars. At the time of said conveyance neither Charlotte nor her husband had any notice or knowledge of the trust created by the aforesaid agreement of Letta Griffin with her father. The said Charlotte was then living on the premises with her husband, and remained in possession until her death, since which her husband and son have been in possession thereof.

(NOTE.—Joseph Church testified before the examiner, under objection on part of plaintiffs, that he took possession in pursuance of an arrangement with Letta Griffin that he would live with her, support her, pay her debts and the legacies mentioned in a will she had made, and that she would deed them (meaning his wife and himself) the property; that he subsequently paid her debts to the amount of between three and four thousand dollars, buried her respectably, and had offered to pay said legacies, and that her deed to his wife was made in pursuance of said arrangement. The master is of opinion that Joseph Church is not a competent witness as to these matters, but falls within one of the exceptions mentioned in the first section of the act of 15th April, 1869, to wit: "Nor where the assignor of the thing or contract in action may be dead." Purdon's Digest, 624, pl. 16. The payment of some of said debts is shown by other witnesses.)

61 Fifth. Said Letta Griffin died 20th March, 1867, having made her last will on 22d September, 1862, by which she devised all of said land to said Charlotte Church, which will was admitted to probate by the register of wills of Luzerne county on 24th April, 1867.

Sixth. On 15th April, 1867, the other heirs of Charlotte Stevens, including seven of her children and the children of a deceased son, brought an action of ejectment for said land against said Joseph and Charlotte Church to No. 173, May T., 1867, in the — common pleas of Luzerne [county].

On 26th July, 1867, six of said heirs brought six separate actions of ejectment for the same land, to Nos. 586, 587, 588, 589, 590, and 591, August T., 1867, and on the 16th of May, 1868, the names of these six heirs were stricken out as plaintiffs in the first-mentioned action, as having been included by mistake.

On 15th November, 1869, in one of said cases, that of Abram Ruland and Letty, his wife, *vs.* Joseph and Charlotte Church, No. 586, August T., 1867, there was a verdict for the plaintiff for the undivided sixteenth of said premises. Judgment was entered on the verdict, and, on writ of error being taken, the same was affirmed. (14 P. F. Smith 432.)

On 27th December, 1870, in first of said actions, No. 173, May T., 1867, there was a verdict for the defendants. The plaintiffs asked for a new trial and the court granted the application.

Seventh. On 22d November, 1871, while all of said actions of ejectment were pending, save that brought by Ruland and wife, which had been determined, a bill in equity was filed in the — common pleas of Luzerne county, to No. 3, January T., 1872, in which all the heirs of Charlotte Stevens, save Charlotte Church, were plaintiffs and Joseph Church and Charlotte Church were defendants.

62 The bill set forth, in substance, that Letta Griffin held the undivided half of the land aforesaid, in trust for the children of Charlotte Stevens, but that, notwithstanding this she had fraudulently devised the whole thereof to one of said children, Charlotte Church. One of the prayers of the bill was that defendants might be decreed to execute and deliver to the plaintiffs deeds for their respective interests.

The defendants, by the answer, denied the alleged trust and averred that Letta Griffin took said land absolutely, in fee-simple, to do with it as she pleased.

The defendants subsequently filed their further answer, in which they said: "The said Charlotte Church also holds, as a *bona fide* purchase, for a valuable consideration, without notice, the whole of the said tract of land in plaintiffs' bill described, and late the estate of Letta Griffin, deceased, by deed of purchase of the said Letta Griffin, deceased, bearing date the 18th of February, 1867, and duly acknowledged before E. Leach, Esq., on the same day, conveying the said tract of forty acres of land to the said Charlotte Church, for the consideration of one thousand dollars in said deed mentioned, beside other good and valuable considerations by the said Joseph Church and Charlotte Church unto the said Letta Griffin thereafter to be paid

and rendered, which said deed was duly recorded on the 1st day of April, 1867, in the office for the recording of deeds in the county of Luzerne, in Deed Book 117, page 166.

From the opinion of Judge Elwell, afterward delivered, it appears that the evidence of this deed was withdrawn. He therefore held that the question of notice of the trust was of no importance, Mrs. Church being a volunteer and not a purchaser for value.

On 9th of October, 1876, while said bill in equity was pend-
63 ing, nonsuit was entered on the application of the plaintffs in five of said ejectment suits, to wit, Nos. 587, 588, 589, 590, and 591, August term, 1867.

On 5th February, 1877, the plaintiffs, in No. 173, May term, 1867, also took a nonsuit.

On the same day the court made a decree in said equity suit that the defendants therein, by deed duly executed, acknowledged, and filed in the office of the prothonotary, on or before the 20th February, 1877, should convey in fee to Letta Ann Ruland an undivided one-sixteenth of the land aforesaid, excepting one acre thereof, which Letta Griffin had contracted to sell to A. H. Noll, and that Charlotte Church held the legal title of said land, excepting as above, as to one undivided one-sixteenth in trust for J. McKiel Stevens, as to an undivided one-sixteenth for Griffin Stevens, as to an undivided one-sixteenth for Louisa Marsh, as to an undivided one-sixteenth for Ann Wise, as to an undivided one-sixteenth for Philip Stevens, and as to an undivided one-sixteenth for the minor children of B. Jerome Stevens, deceased, to wit, Rozelle, Lillie, Zelda, and Jennie Stevens, and that the defendants, by deed duly executed, acknowledged, and filed in the office of the prothonotary for delivery to the grantees on or before 10th March, 1877, should convey in fee to the *cestuis que trustent* named the said several one-sixteenth parts of said land, excepting the one acre contracted as before stated to A. H. Noll.

Afterward, on 1st February, 1878, the said decree was amended by the court, *nunc pro tunc*. The material portions of said amended decree are as follows: "In the master's report and in the decree, a mistake occurred in finding that the share of each of the heirs of Charlotte Stevens, deceased, in the undivided one-half of the land described in the plaintiffs' bill is one undivided sixteenth. The bill,
which in this respect was unquestioned, sets forth the names
64 of saidheirs, and the whole case shows, and the master so reported, and the court intended to decree, that each child of Charlotte Stevens, and the children of a deceased child, as the representatives of their deceased parent, should have an equal undivided share in the undivided one-half of the land described. There were nine children, including Charlotte Church, one of the defendants, and Helen Kelsey, one of the plaintiffs, whose name was by mistake omitted in the decree. It follows that the share of each heir should have been declared to be an undivided one-eighteenth instead of an undivided one-sixteenth of the land held in trust by Mrs. Church. In an action of ejectment Letta Ann Ruland, one of the heirs, recovered the undivided one-sixteenth of the land described,

but by writing filed herewith she consents that the decree be entered that her share or purpart is but one-eighteenth.

"It is now, February 1, 1878, ordered as of February 5, 1877, that the report of the master as to the share or purpart of the plaintiffs be corrected, so that one share or purpart shall be declared to be an undivided one-eighteenth instead of one-sixteenth, and that the decree be amended by striking out the words 'one-sixteenth' wherever they occur in the decree, and inserting in lieu thereof the words 'one-eighteenth,' and after the name of Philip Stevens, where it occurs in the decree, insert 'as to an undivided one-eighteenth part thereof to Helen Kelsey?'

"And it is ordered and decreed that a deed be made in accordance with the amended decree."

Eighth. Since the making of said decree and the amendment thereof, the heirs of Charlotte Stevens, with the exception of Charlotte Church, have jointly conveyed the undivided eight-ninetieths of said land to Caleb E. Wright, Samuel Linn, Isaac P. Hand, and H. W. Palmer; Louisa Marsh has conveyed the undivided four-
ninetieths thereof to C. F. Williams, and Griffin Stevens has
65 conveyed the undivided four-ninetieths thereof to Elisha Griffin.

Ninth. No deed was ever made by the said Joseph Church and Charlotte Church in pursuance of the said amended decree. Said Charlotte died without having complied with said decree, although she and her husband, the said Joseph, were notified and required so to do.

Tenth. Said Charlotte Church died intestate on 17th July, 1880, leaving one child, Charles J. Church, a minor, of whom said Joseph Church has been duly appointed guardian.

The question for determination is whether, under the facts as above stated, the plaintiffs are entitled in equity to have partition made of said land. It is contended that they are not so entitled, for the reason that the defendants deny the alleged title of the plaintiffs, and have shown the full legal title to the whole of the premises to be in themselves, and for the further reason that there is no unity of possession, but that, on the contrary, the defendants have held an exclusive, adverse possession from 1867 down to the present time.

There are two matters involved in this contention: One is the title to the land, the other the character of the posession.

As to the title, the plaintiffs reply that it was adjudicated and determined by the decree in the equity proceeding above mentioned; but the counsel for the defendants says that this proceeding was *coram non judice* and void, because the wills of both Thomas Griffin and Letta Griffin, had been duly admitted to probate, and under the seventh section of the act 22d April, 1856 (Purdon's Digest, 407, pl.
12), there was but one way in which either of these could be
66 contested, and that "by caveat and action at law duly pursued," begun within five years from the date of probate. The words "action at law," as here used, have been judicially defined to mean "an issue triable in the common pleas, directed by the orphans'

court after an appeal thereto from the decree of the register." Wilson *vs.* Gaston, 11 Norris, 215.

The same section of the same act was cited by the counsel for Joseph Church and wife, in Church *vs.* Ruland, 14, P. F. Smith, 439, to sustain the conclusiveness of the probate of Thomas Griffin's will. Sharswood, J., in his opinion, said: "It is not effected by the statutory provisions on the subject of wills. The proof offered is not of any alteration, revocation, or cancellation, which must be evidenced in a particular manner. It gives a full effect to the will and every word of it, and to the conclusiveness of the probate, where it is conclusive. It fastens upon the conscience of the party, having thus procured a will, and then fraudulently refusing or neglecting to fulfill the promise on the faith of which it was executed, a trust or confidence which a court of equity will enforce, etc. *Idem*, 442.

A portion of these remarks may be applied as well to the will of Letta Griffin. The said bill in equity did not attack this will; it attacked the title of the testator to the land devised. It would have been idle, so far as the facts appear, for the heirs of Charlotte Stevens to have contested that will in any way whatever. The cases cited by the learned counsel for defendants are all those in which attempts were made entirely to set aside and annul, either by a bill in equity or an action of ejectment, wills which had been duly admitted to probate. Here there was no such attempt. Neither the will of Thomas Griffin nor that of Letta Griffin was attacked or contested. The master is therefore of opinion that the said proceeding in equity was valid and not void.

67 But the defendants now set up a title which was not passed upon in said equity proceeding. It is true that it was set up in one of their answers to the plaintiffs' bill in that case, but the evidence of it was withdrawn and the court did not consider it.

It is a general rule of law that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive between the same parties or their privies in estate, in blood or in law, on the same matter directly in question in another court. This rule is not applicable to all actions of ejectment, but that is because of the possessory character of the action, and not because land is the subject-matter. It is applicable to actions of ejectment upon equitable titles, to actions of trespass involving title to real estate, and to bills in equity for the specific performance of contracts or the execution of trusts. There is no charm about land, as land, which relieves it from the operation of the general rule.

Stevens *vs.* Hughes, 7 Casey, 385.

But is a judgment or a decree conclusive as to a title that might have been shown, but was not? In Cromwell *vs.* County of Sac, 4 Otto, 351, Mr. Justice Field says: "The judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or de-

mand, but as to any other admissible matter which might have been offered for that purpose."

In Henderson *vs.* Henderson, 3 Hare, 100–115, cited by Justice Field, the same doctrine is thus stated: "The plea of *res adjudicata* applies, except in special cases, not only to the points upon
68 which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising a reasonable diligence, might have brought forward at the time."

See also Embury *vs.* Conner, 3 Comstock, 522.
Petersine *vs.* Thomas, 28 Ohio St. R., 596.
Lawrence Savings Bank *vs.* Stevens, 46 Iowa, 429.

This doctrine has been applied to cases involving the title to real estate.

Stevens *vs.* Hughes, 7 Casey, 387.
Kelly *vs.* Donlin, 70 Illinois, 378–385.
Caston *vs.* Perry, 1 Bailey (S. C.), 533.

And with reference to the effect of a decree in equity it was said by Mr. Justice Sharswood in Taylor *vs.* Cornelius, 10 P. F. Smith, 187–199: "Whatever question was properly involved in the former suit, and might have been there raised and determined, is conclusively settled by the decree."

Bolin *vs.* Connelly, 23 P. F. Smith, 336, was a case somewhat analogous to the one under consideration. It was an action of ejectment. The defendant set up, as a bar to the action, a former recovery upon an equitable title. The plaintiff relied upon his legal title, and upon want of notice to his grantor, Whitmore, of the outstanding equitable title. In the opinion of the court by Agnew, J., he said: "Had Whitmore in that trial set up the deed from Terrence Timmons to himself as a purchaser for a valuable consideration, and without notice of the sale of Timmons to Barnard Burns, and that he had duly recorded his deed, a different question might have arisen in the trial of this case. But as no such issue was presented and tried in the former ejectment, we must presume now that Whitmore failed to set up the defence because he knew then it
69 would not avail him, and, therefore, defended against the plaintiff's equity alone." The verdict and judgment in the former ejectment were therefore held to be conclusive. The principle deducible from this case is that where one has recovered on an equitable title, in a suit wherein no other title was litigated, the opposite party is precluded from afterward setting up, as a ground of recovery in another suit, matter which he might have offered as a defence in the former suit, but did not. It is but stating the same principle in different words, to say that after such a recovery the defeated party is precluded from setting up a title which he might have set up in the former suit, but did not. The rule, as thus stated, would prevent the present defendants from asserting the title set up in their answer.

On the other hand, in Treaster *vs.* Fleisher, 7 W. & S., 137, it was held by Chief Justice Gibson that, notwithstanding the act of Assembly making two verdicts in ejectment and judgment thereon between the same parties conclusive, they were not so, unless rendered upon the same title. "It certainly could not have been intended," he said, "that a title should be barred by adjudication without having been adjudicated."

The ruling in this case, however, does not necessarily conflict with the principle deduced, as above stated, from Bolin *vs.* Connelly. It is true that in the first of the two ejectments relied upon as a bar an equitable title, under a contract of sale, was the only one litigated. The vendee, in addition to his contract, held another title adverse to his vendor. But he could not then set it up and did not, because he could not keep the land and retain the price. The vendor recovered a conditional verdict and judgment. It was not paid, and the vendor regained possession by an execution. The contract being thus rescinded the chief justice held that the parties were remitted to their rights and capacities as they stood originally. He
70 treated this ejectment, therefore, in its bearing upon the adverse legal title as though it were an ordinary and not an equitable ejectment. Thus explained, the rule to be drawn from this case would seem to be that, in order to give effect to two verdicts and judgments in ejectments, each founded upon a legal title, as a bar to another ejectment, it is necessary that they should have been rendered upon the same title.

In the case under consideration the only title adjudicated was an equitable one. The defendants might then have set up the title which they now set up, but they withdrew it from adjudication. The case in both these particulars is like that of Bolin *vs.* Connelly, and in the latter particular, at least, is unlike Treaster *vs.* Fleisher.

But there is one feature which distinguishes it from both those cases. It was a suit not merely to try the title, but also to compel conveyances. Was it not the bounden duty of the defendants, then, to set up every title under which they claimed to hold in order to prevent a decree for conveyance? Such a decree was made. True it has not been executed; but in equity the fiction obtains that what ought to be done shall be considered as being actually done, as said by Sharswood, J., in Church *vs.* Ruland, "Such a conveyance will be considered as having actually been made whenever it ought to have been made." Suppose, then, the conveyances to have been made as decreed, they certainly would have swept away every title of the defendants to the portions conveyed. Peterman *vs.* Huling, 7 Casey, 433. The master is therefore of the opinion that the title of the plaintiffs is clear.

It remains to determine whether the adverse possession of the defendants is fatal to the plaintiffs' bill.

The rule in this State seems to be that in an action at
71 law for partition, adverse possession by the defendant for any length of time, however short, will bar a recovery in such form of action.

Law *vs.* Paterson, 1 W. & S., 184, 193.
Longwell *vs.* Bently, 3 Grant, 177.

And the latter case, which was twice before the supreme court of our State (see 11 Harris, 99), seems to have been one in which defendant showed no title, but simply denied the plaintiff's title, which apparently was clear.

The rule just stated is the old rule of the common law. To break its hardship courts have required decisive evidence of ouster or disseisin. They have held that actual possession by plaintiff was not necessary if he had constructive possession, and in many cases that the possession of defendant, though apparently exclusive and adverse, was constructively the possession of both plaintiff and defendant, as cotenants.

Galbraith *vs.* Galbraith, 5 Watts, 146.
Tabler *vs.* Wiseman, 2 Ohio State, 207.
Foust *vs.* Moorman, 2 Indiana, 17.
Barnard *vs.* Pope, 14 Mass., 436.

In the latter case Parker, C. J., said: "We think it cannot be inferred from that decision that an actual corporeal seisin is necessary to enable a tenant in common to maintain this process. If it were so this beneficial remedy would be much restricted in its operation, and it would always be in the power of one tenant, by ousting his cotenant, to drive him to a writ of entry." "Every dispossession does not amount to a disseisin, especially of tenants in common, for the possession of one is the possession of all, unless by an actual ouster or an exclusive pernancy of the profits against the will of the others one shall manifest an intention to hold the land by wrong rather than the common title." This is quoted not as strictly applicable to the present case, but as a fair sample of the ten-
72 dency of modern decisions in other States. In Marshall *vs.* Crohore, 13 Metcalf, 462, Barnard *vs.* Pope was approved by Shaw, C. J., who went still further and held that plaintiffs were entitled to partition, even though actually disseised, provided their title was clear and they had the right of entry.

While in this State the rule seems to remain unshaken, so far as actions at law are concerned, that partition will not lie where the possession is adverse, it seems to be an undecided question whether a bill in equity for partition can be maintained where the plaintiff's title is clear but the possession adverse. But outside of this State the question has been decided. In Parker *vs.* Gerard, Ambler, 236 (cited in 13 Illinois, 107), it was said: "Such a bill is a matter of right, and there is no instance of not succeeding in it but where there is not proof of title in plaintiff." Chancellor Kent, while he does not seem to have ruled directly on the question, has intimated very strongly an affirmative opinion. In Wilkin *vs.* Wilkin, 1 Johnson's Ch. Rep., 117, plaintiffs were not in possession, but had brought ejectment, which was pending. The chancellor said: "If there was no question about the plaintiffs' title I think I should have no doubt about the propriety of awarding partition." And again, in Phelps *vs.* Green, 3 Johns. Ch. R., 304, he said: "Partition is a matter of right where the title is clear, but not otherwise." In his commentaries, vol. 4,* 364, he says: "But a court of equity does not inter-

fere unless the title be clear, and never where the title is denied or suspicious until the party seeking a partition has had an opportunity to try his title at law." The expression "when the title is denied" ought certainly to mean something more than a mere naked denial of a clear title. As said in Hoffman *vs.* Beard, 22 Michigan, 64: "If the title, though of a legal character, be undisputed, or perhaps, though denied, if it appear to be so clear and incontestable as to admit of no reasonable doubt, and the court can see that a trial at law would be a mere formality, the bill will be maintained."

73 In New Jersey it seems hardly to have been questioned that a clear title without possession was sufficient to support a decree in equity for partition.

Obert *vs.* Obert, 12 N. J. Eq. R., 426.
Davidson *vs.* Thompson, 22 N. J. Eq. R., 83.

In Howey *vs.* Goings, 13 Illinois, 97–107, the question was squarely met and distinctly ruled. The opinion of the court was delivered by Mr. Justice Trumbull. He said: "The case has been argued as if it were a proceeding upon the common-law side of the court, when in fact it is strictly a chancery proceeding. * * * It is unnecessary, in our view of the case, to inquire whether the possession of the defendants was adverse or not. * * * There can be no doubt that a bill in chancery lies for partition, notwithstanding an adverse possession, unless it has been continued sufficiently long to bar a recovery under the statute of limitations."

Although this case has no binding authority here, it is not in conflict, so far as the master can discover, with any ruling of our supreme court, however it may seem to be with the dicta of some of our judges. It is, moreover, in accord with the dicta of Chancellor Kent and with the New Jersey cases above cited; and opinion given seems according to reason and justice, overcoming, as it does, a technical objection. The master therefore holds that the bill in the present case can be maintained, and finds as conclusion of law and fact—

First. That the plaintiffs and defendants are the owners in fee, as tenants in common, of all that certain tract of land, situate in the city of Scranton, county of Lackawanna and State of Pennsylvania, bounded and described as follows, viz: On the east by the Lackawanna river, on the south by lands now or formerly of Philo Griffin and H. S. Pierce, on the west by the Delaware, Lacka-

74 wanna & Western railroad, and north by lands now or formerly of F. A. Griffin and John Frances, containing forty acres, be the same more or less, and being the same land which Thomas Griffin, deceased, by his last will and testament, dated the 27th day of March, A. D. 1852, and proved before the register of wills of Luzerne county, on the 3d day of April, A. D. 1854, devised to Letta Griffin, excepting, however, all that part of said land which Letta Griffin, by articles of agreement, dated September 27th, 1864, contracted to sell to A. H. Noll, and described as follows: Beginning at a corner in the centre of the road leading from Providence to Scranton; thence east by lands of Philo Griffin about four chains

and seventy-five links; thence north by lands of Philo Griffin and Letta Griffin far enough to make one acre of land, with a line running parallel with south line to centre of said road to the place of beginning, one acre of land, strict measure; and they own, respectively, the following proportions of said land, to wit: Charles J. Church, the undivided fifty-ninetieths, subject to the life estate of Joseph Church, as tenant by *the* courtesy; Elisha Griffin, Helen M. Kelsey, Ann Wise, Sidney Philip Stevens, Letta Ann Ruland, C. F. Williams, and J. McKiel Stevens, each four-ninetieths; Rozelle Brown, Jennie Medway, Lillie Stevens, and Zelda Stevens, each one-ninetieth, and Caleb E. Wright, Samuel Linn, Isaac P. Hand, and Henry W. Palmer, each two-ninetieths.

Second. That the defendants, by themselves and Charlotte Church, have been in exclusive, adverse possession of said land since 1867.

Third. That the plaintiffs, having a clear title to their respective proportions of said land, are entitled to a decree of partition, notwithstanding the adverse possession of the defendants.

Scranton, 28th November, 1884.

W. W. LATHROPE,
Master in Chancery.

75 V.

Exceptions to Master's Report.

Plaintiff's exceptions.

The plaintiff excepts to the fourth finding of fact by the master, when it is stated that "at the time of said conveyance neither Charlotte nor her husband had any notice or knowledge of the trust created by the aforesaid agreement of Letta Griffin with her father," when the contrary appears by the testimony of Anna Wise, page 113 of paper book; of Henry Knapp, page 122, and of Mrs. Church herself, pages 174 and 175, and because there is no competent evidence in the case upon which such a finding can be based.

2d. In not finding, as a conclusion of law, that after the decree directing a conveyance by Church and wife in contemplation of the law the rule, that whatever ought to have been done must be considered in equity as having been done, operated, and therefore, as it was the duty of the said Church and wife to execute a conveyance and admit the plaintiff as tenant in common of the land described in the bill, they are now estopped from setting up their own default or in claiming to be adversely possessed of the said land.

Dec. 5, 1884.

HENRY W. PALMER,
Solicitor for Plaintiff.

Filed with the master 9th December, 1884.

Exceptions on Part of Defendants to Master's Report.

It is respectfully submitted that the learned master errs in the following particulars, to wit:

76 1st. In the second finding of fact, the same being without legitimate evidence to support it.

2d. In rejecting the evidence of the defendant, Joseph Church, on the ground that he was not a competent witness, thus overlooking the fact that the plaintiffs themselves called him and thus made him a competent witness.

3d. In ruling that "neither the will of Thomas Griffin nor that of Letta Griffin was attacked or contested."

4th. In ruling that the bill and proceedings in the suit in equity in Luzerne county, No. 3, January term, 1872, Heirs of Charlotte Stevens *vs.* Joseph Church and Charlotte Church, were *coram judice* and valid.

5th. In ruling that the court sitting in equity, in the said last-above mentioned cause, had jurisdiction to try the legal title to the land acquired by purchase from Letta Griffin.

6th. In ruling that the defendants in that equity suit by not bringing in their said legal title to be tried and settled in equity, and thus abandoning the right guaranteed to them by the constitutions, both of the State and of the United States, to have this tried only at law, have set themselves outside of the protection of the said constitutions, and forever forfeited their constitutional right to have this legal title tried at law.

And that this disability not only affects thus the said defendants, but extends over by some process of imputation and likewise affects the present defendants.

7th. In thus ruling that the plaintiffs in the said equity suit had in their own hands a power greater than that of the Legislature of the Commonwealth, to wit, the power, by abandoning their actions at law, the ejectments which they had brought, and filing a
77 bill in equity to deprive the defendants of their constitutional right of trial by jury, and compel them to submit their legal title to the land by regular *bona fide* purchase to be tried and decided by the court sitting in equity, and moreover thus to supersede the law as it stands upon our statute books by making one trial conclusive and thus depriving the defendants of the two trials to which they are entitled at law.

It is respectfully submitted that the learned master has herein adopted a course of reasoning which has involved him in some confusion and inconsistency, and thereby evolved a ratiocinative power, which transcends the legislative power in this Commonwealth. If the legal title to the land purchased and now held by these defendants was necessarily involved in that suit in equity then the court sitting in equity had not jurisdiction. If, on the other hand, the court had jurisdiction in the said equity suit, as the master finds, then this legal title was not necessarily involved.

8th. In ruling that a mere decree for certain conveyances against a dead woman, which can never be enforced, vests in the plaintiffs a clear and complete title to the land against the present defendants, and operates to divest them of their title without a legal hearing.

9th. In ruling that partition can be maintained by plaintiffs,

between whom and defendants there never was at any time unity of possession either at the time of filing the bill or before or since.

10th. In ruling that partition can be maintained by plaintiffs, who never had possession of any kind.

11th. In ruling that partition can be maintained against defendants holding by adverse possession and denying the title of plaintiffs in toto. And in this the learned master has evidently over-
78 looked the fact that the plaintiffs themselves have declared this to be the true situation in the ejectments brought by them.

12th. In the first conclusion of law and fact in stating that plaintiffs are owners in fee and tenants in common with defendants of the land therein mentioned.

13th. In the third conclusion of law and fact finding that plaintiffs have a clear title to their respective proportions of said land, and are entitled to a decree for partition.

December 12, 1884.

Respectfully submitted,

A. RICKETTS,
Counsel for Defendants.

Filed with the master, 13th December, 1884.

Amendment of the Master's Report.

Two exceptions to the report, on the part of the plaintiffs, were filed with the master on 9th December, 1884.

Thirteen exceptions, on the part of the defendants, were filed on 13th December, 1884.

The second exception on part of the defendants is well founded. The master did overlook the fact that plaintiffs themselves called Joseph Church as a witness, and thus made him competent to testify as to any matter properly involved.

The master therefore amends his fourth conclusion of fact so that the same shall read as follows:

79 4th. In 1864, while Letta Griffin was living with Joseph Church and his wife in Wisconsin, the said Letta, being embarrassed by debts, proposed that if said Joseph would come back and live with her in Pennsylvania and pay her debts and support her through her lifetime, and pay the legacies of a will she had made, then she would deed them the said property. Said Joseph concluded to do so; and in the fall of 1864 came back with his family and said Lotta, took possession of said premises, managed them as though they were his own, making valuable improvements upon them, and paid off the debts of the said Letta to the amount of between three thousand and four thousand dollars.

In pursuance of this arrangement the said Letta, by deed dated and acknowledged 18th February, 1867, and recorded 1st April, 1867, conveyed the said land to Charlotte Church for the consideration of one thousand dollars. At the time of said conveyance neither Charlotte nor her husband had any notice or knowledge of the trust

created by the aforesaid agreement of Letta Griffin with her father. The said Charlotte was then living on the premises with her husband and remained in possession until her death, since which her husband and son, the present defendants, have been in possession thereof.

Said Letta lived on said premises with said Joseph and his family until her death. He buried her respectably and offered to pay the legacies mentioned in her will.

As to the other exceptions, whether on the part of the plaintiffs or the defendants, the master is of opinion that they are not well founded.

15th December, 1884.

W. W. LATHROPE, *Master.*

As to the foregoing finding of facts the plaintiffs except—

80 1st. Because the master should have found that Letta Church had full knowledge of the trust under which her aunt, Letta Griffin, held the land.

December 16th, 1884.

H. W. PALMER,
Attorney for Plaintiffs.

This last exception filed with me 17th December, 1884,

W. W. LATHROPE, *Master.*

IV.

Opinion of the Court.

Exceptions to master's report.

The plaintiffs by this bill seek partition of certain lands in the possession of the defendants, alleging title in themselves to forty-ninetieths ($\frac{40}{90}$) undivided, the remaining fifty-ninetieths ($\frac{50}{90}$) undivided being owned by Charles Church, one of the defendants in fee, as heir of his mother, Charlotte Church, deceased, subject to the courtesy interest of his father, Joseph Church, the other defendant. The plaintiffs set out their title in brief as follows, to wit: That Thomas Griffin, a common ancestor, was seized of these lands in his lifetime in fee, and by his will devised them to his daughter, Letta Griffin, upon the express trust that at her death she should convey or devise the undivided half thereof to the children of her deceased sister, Charlotte Stevens; that Letta Griffin died March 27th, 1867, without having executed this trust, leaving Charlotte Church (one of the children of said Charlotte Stevens) and Joseph Church, her husband, in possession of the land; that said Charlotte Church and wife, denying the said trust and claiming to be sole owners of the lands by deed and devise

81 from Letta Griffin, a bill in equity was brought by the other children and heirs of Charlotte Stevens against Charlotte and Joseph Church to enforce the trust, and it was therein decreed that Mrs. Church held said lands bound by said trust, and she was ordered

to convey to the plaintiffs in said bill in fee eight-eighteenths ($\frac{8}{18}$) undivided of said lands; that Mrs. Church died July 16th, 1880, without having complied with this decree, leaving her husband, Joseph Church, and a minor child, Charles Church, surviving her; and that the plaintiffs in the present suit are the same as in the former suit, except that Caleb E. Wright, Samuel Linn, Isaac P. Hand, and H. W. Palmer hold the undivided eight-ninetieths of said land by conveyance from all the heirs of Charlotte Stevens except Mrs. Church, and that Louisa Marsh, one of the said heirs, has conveyed to C. F. Williams, and Griffin Stevens, another heir, has conveyed to Elisha Griffin.

The defendants here (Joseph Church being guardian of his son Charles) in answer deny the trust in Letta Griffin, admitting the equity proceedings, but denying that they were sufficient to vest any title in the complainants or to authorize them to obtain a partition, and further setting up that they are seized of the full legal title by virtue of a *bona fide* purchase for value without notice, in pursuance of which possession was taken in 1867, and continuously held ever since.

From the bill, answer, and proofs the master has found the facts substantially as set forth in the plaintiffs' bill. He has also found in regard to the title by purchase set up by the defendants that Letta Griffin, by deed dated February 18th, 1867, conveyed the land in question to Charlotte Church, for the consideration of one thousand dollars, and that at this time neither Mrs. Church nor her husband had any knowledge of the trust created by the agreement of Letta with her father; that this defence was set up in a supplemental answer put in by Mrs. Church in the former suit, but that the evidence in regard to this deed was withdrawn.

82 An exception on the part of the plaintiffs here is addressed to the master's finding that Mrs. Church had no notice of the trust. If the offer in evidence by the plaintiffs before the examiners of the records in the former suit carried in with it the testimony of the witnesses taken in that case there would be considerable evidence that Mrs. Church knew of the trust. J. M. Stevens, Mrs. Ann Wise, and Henry Knapp testify to conversations in regard to this trust when Mrs. Church was present, and the qualified answers of Mrs. Church herself, when giving her testimony-in-chief in that case, imply that she knew of a promise by her Aunt Letta to give a portion of the property to the Stevens children, and that at one time she (Letta) had made a will giving one-half to them. Based upon this, the master in that case (Mr. Bedford) found as a fact that Mrs. Church had due notice of the trust.

But I do not consider either the offer in evidence of the record of that case or the reference to it in the third paragraph of defendants' answer sufficient to carry into and incorporate in this case the proofs there relied upon, except so far as to show the issues therein tried and determined. There is, therefore, no evidence in this case on which to base a finding that Mrs. Church had notice of the trust in question.

On the other hand, there is no sufficient evidence that Mrs. Church

was without notice. The only proof on the point is the statement by Mr. Church in his examination-in-chief that he "never heard a word or a lisp from no living person, nor did my wife, to my knowledge, of anything in their (plaintiffs') favor, except that they were to be paid a certain amount of legacies in the will she (Letta) made."

This is not an assertion of knowledge on his part in regard to the fact of whether Mrs. Church had notice of the trust, and a positive statement based on such knowledge that she had not, but simply that, so far as his knowledge extended, such was the case. It does not support a finding that she had no notice.

83 Nor does the 5th paragraph of the answer affect this question. The matters therein asserted are new and distinct from those in the bill, and are set up to defeat the plaintiffs' equities. They therefore amount to mere pleading in the nature of confession and avoidance at law. (3 Gr., §§ 284–287, 290.)

Moreover, they have not such particularity of statement as would entitle them to be received as evidence, and were this also not so, resting as they do upon the sole oath of Joseph Church, the insufficiency of his knowledge is seen above.

The findings of the fact of the master must, in this particular, therefore, be corrected; and I find as a fact that while Joseph Church had no knowledge of the trust in question it does not appear whether Mrs. Church had or not. The view I have taken of the case makes this matter immaterial, but I have considered it right to settle it to facilitate a proper review of the whole case in a higher court.

Having determined the facts, it remains to consider the equitable principles bearing upon the case thus presented.

There is no force in the argument of counsel that, because of defendants' adverse possession and their denial of plaintiffs' title, these proceedings for partition in equity cannot be maintained.

It is true that at law, in an action of partition, possession adversely held, for however short a time, will prevent a recovery (Law *vs.* Patterson, 1 W. and S., 193; McMasters *vs.* Carothers, 1 Barr, 325; Florence *vs.* Hopkins, 46 N. Y., 186), for an action of partition cannot be turned into an ejectment nor made the medium of trying titles. Such action is entirely based upon the fact of joint possession.

But the distinction between the principles applicable to partition at law and in equity must be kept in view. Jurisdiction of partition in equity, like other equitable jurisdiction, grew up to supply defects and inadequacies in proceedings for partition at common

84 law. (1 Story Eq. Juris., §§ 650–658.) The proceedings in equity are therefore much more completely remedial, and obstacles insurmountable in the one case furnish in the other but occasion for assuming jurisdiction for the very purpose of overcoming them.

It is no permanent obstacle in equity that the title is denied; for if the title in dispute be legal, and have not been ascertained at

law, the bill is retained until the conflict of titles has been determined by action. (Wilkin *vs.* Wilkin, 1 Johns. Ch., 117.)

But if the title in question be equitable the court at once proceeds to determine it, and then orders partition accordingly. A suit in equity for partition may thus become the medium of settling a disputed equitable title. Thus it is said in Lucas *vs.* King, 2 Stock (N. J.), 277: "The defendants deny the complainant's title. If the title in dispute is an equitable one, it is the duty of this court to settle it. If it is a legal title, the court may dismiss the bill or may retain the cause and afford the party an opportunity of settling his title at law. * * * I do not understand, however, that the bare denial of the complainant's title is any obstacle to the court's proceedings. The defendant must answer the bill, and if he sets up a title adverse to the complainant, or disputes the complainant's title, he must discover his own title, or show wherein the complainant's title is defective. If, when the titles are spread before the court upon the pleadings, the court can see that there is no valid legal objection to the complainant's title, there is no reason why the court should not proceed to order the partition."

Again, in Coxe *vs.* Smith, 4 Johns. Ch., 276, it is said: "The first point is whether the defendants can set up equitable rights in opposition to the legal title and claim partition according to those rights by an answer. When the legal title is disputed and doubtful the course has been to send the plaintiff to law to have that title established before he comes here for a partition. * * * But when the ques-
85 tion arises upon an equitable title set up on the part of the defendant, this court must decide the title, for equitable titles belong particularly to this court, and the parties cannot be sent to law. * * * In Cartwright *vs.* Pultney, 5 Ath., 380, the plaintiff's supplemental bill for partition was founded on an equitable title, and Lord Hardnicke said he must determine it. Though the objection there was that it was an equitable title—not a legal one—he decreed a partition, and that the trustees in whom the legal title resided should convey. If the plaintiff can come into this court for a partition upon an equitable title the defendants who are brought here upon such a bill can surely set up such title to be recognized and protected upon the partition."

In Hoffman *vs.* Beard, 22 Mich., 59, 64, Judge Christiancy says: "If the title be an equitable one, or partly equitable and partly legal, the court of equity may very properly try the titles."

And in Deery *vs.* McClintock, 35 Wisc., 205, Dixon, Ch. J., says: "The cases in this court where issues of title adversely claimed and asserted have been tried and determined in partition have been only where such title was equitable in its nature, or where some recognized principle of equity jurisprudence was involved, thus making the title a proper subject of cognizance in a court of equity."

So in Story's Eq. Jurisp., § 634, N. 1 (12th edition), it is said: "Where the titles are equitable, or there are equities to settle, a court of equity may be resorted to for that purpose, and will under the same bill decree partition." See also Obert *vs.* Obert, 2 Stock, 102.

The plaintiffs, therefore, asserting an equitable title, may properly proceed in equity for a partition, and the mere denial of their title, or the assertion of a possession adverse to it, is not sufficient to prevent a decree.

Nor can the defendants prevent the case from proceeding to
86 a decree by setting up a legal title, unless thereby a dispute is made over such title. The mere fact that, in the assertion of their equities, parties are met by a legal title will not throw the case over for determination by a court of law. Where the distinction between legal and equitable remedies is preserved the proper forum to decide whether the equitable title shall prevail against the legal is a court of equity and not of law. To remit the case to the latter court would be to shut out the consideration of anything but the legal title, which might be perfect in the defendants and yet in a court of equity have to give way. Where the legal title is in dispute between the parties it must go to a court of law, but not otherwise. How, for instance, could these plaintiffs establish their rights in a purely common-law court?

It is no answer that in this State recovery may be had in ejectment upon an equitable title. We are to consider the matter as a question of pure equitable and legal jurisdiction, and not with regard to our own mixed forms.

It is therefore clear that, as against a party in possession of land and holding the legal title, relief for another upon an equitable title must be sought in a court of equity alone, and these equities may be declared in a bill which proceeds at the same time for a partition. It is not necessary to establish them first in an independent suit. Cf., Cox *vs.* Smith, 4 Johns. Ch., 276.

I have thus considered at length the proper limits of the jurisdiction of partition in equity where there is an alleged dispute of title. It will be seen that the plaintiffs are clearly within the limits so ascertained. Their title, though in terms disputed, is not even doubtful. It has been fully established and ascertained by the former suit in equity in Luzerne county. There is no necessity to re-establish it here. It is true they have no conveyance to them of the legal title. But what of that? Even an action of partition may be maintained where the plaintiff has such an equity as would entitle him to compel a conveyance. Willing *vs.* Brown, 7 S. & R., 467. How much more—a bill!

87 The legal title is before the court, and conveyances can be ordered if partition be decreed. There is no need therefore for a bill of revivor against the heir. And as for the doctrine of disseisin and descent cast, though it might have to be considered if this were a partition at law, it has no place here.

It is useless to argue, also, that the decree which established in favor of these plaintiffs a trust *ex maleficio*, arising from the breach of Letta Griffin's promise to her father, overrides the act of 1856, relating to the conclusiveness, after five years of the probate, of a devise of lands. That question was considered and set at rest by the Supreme Court in Church *vs.* Ruland, 14 P. F. Smith, 439, in passing upon this very title. There may be expressions of opinion by indi-

vidual judges of that court questioning the soundness of that decision, as by Mr. Justice Gordon in Salter *vs.* Bird, 14 W. N. C., 154, where he says that the case "goes far toward the destruction of a most valuable statute, especially designed for the quieting of titles to real estate." But how can that be made available for the reconsideration of the subject in a collateral proceeding?

The only serious question is whether the former suit settled all the matters at issue between these parties in regard to the title to these lands, or whether the defendants may still set up and contest the title under their deed from Letta Griffin.

Whether or not the learned master is right in holding that the defendants were bound to set up that title in the former suit, and that they are precluded from doing so now, I do not need to consider. There is a more certain ground on which to base the conclusiveness of the former decree. As the master well says, that suit proceeded not only for the purpose of declaring the trust in favor of the Stevens children, but also of compelling a conveyance. The only object of Mrs. Ruland in joining in the suit was for the latter purpose. Her rights had been settled by her ejectment. When
88 therefore the plaintiffs obtained a decree for a conveyance in fee, it bound whatever title Mrs. Church and her husband had. They could not have conveyed a fee and still have a fee in reserve. If it was intended to reserve for further litigation the title derived by the deed from Letta Griffin (admitting that that could be done), the withdrawal was incomplete. They ought to have had that title excepted out of the decree, and any conveyance which was ordered limited simply to the estate which Mrs. Church acquired by the devise from her aunt, Letta. This was not done, and the decree must now have effect as it stands. It is of no importance that the court decided the case merely on Mrs. Church's position as a volunteer, as devisee under Letta Griffin's will. A former decision must be regarded, though it may have proceeded upon an erroneous principle. (Brown *vs.* Tallman, 5 W. & S., 556). We can only look at the decree, which is for a conveyance in fee absolute. We cannot disturb it, nor refuse to give it effect.

In Peterman *vs.* Huling, 7 Casey, 432, 433, where there was a plea of former recovery, it was said by Strong, J.: "The former action, though in form an ejectment, was in substance a bill by a *cestui que trust* against his trustee to enforce the execution of the trust. The title of Huling, the plaintiff in that case, was purely an equitable one. It rested upon the assertion that Coder and Peterman held the legal title to two tracts of land, one-half of which was purchased with his money, and that they held it under an agreement that it should be for the joint use of Coder and Huling. In a court of law, therefore, Huling would have had no case. In England he must have gone into equity and prayed a chancellor to decree a conveyance by the trustee to him.

"The ejectment which he brought was a substitute for such bill in chancery. But if a chancellor has decreed such a conveyance by the trustee to the *cestui que trust*, and enforced his decree, it would have forever estopped Coder and Peterman from denying that Huling

was the owner, both legal and equitable, of the one-half of the
89 land. Such a decree would have been conclusive upon them in any subsequent suit, or in any other court."

Again it is said by the same learned justice in Stevens *vs.* Hughes, 7 Casey, 381, 387: "It is urged that the former judgment was not upon the same title as that now in controversy. We think it was. But whether it was or not is immaterial. Whatever may be the effect of a verdict and judgment in ejectment, in a second ejectment founded upon a different title it must not be forgotten that a judgment upon a traverse of a plea of *liberum tenementum* is not an adjudication of any particular right by which a party holds the lands, but upon the question whether he has the freehold at all. It certainly would be esteemed no answer to a judgment establishing A's ownership of a horse, that he had asserted his title through a purchase from B, when in truth he had bought from C. The error of the argument is that it assumes that we may go behind the judgment to inquire through what evidence it was obtained.

These cases fully sustain and forcibly illustrate the conclusions arrived at above, and establish the conclusiveness in this suit of the former decree.

But the learned counsel for the defendants contends that their title under the deed could not have been passed upon by the court of common pleas of Luzerne county, sitting in equity, because it was a legal title, and being such, it could only by the guaranty of the Constitution, be tried in a court of law, where two verdicts of a jury concurring, are required to settle it; and that the former suit in equity was as to such legal title *coram non judice* and void.

The error in this position is readily apparent. That the legal title was in Mrs. Church, was not disputed. But it was for the purpose of charging that legal title with an equity, to wit, a trust *ex maleficio* that the proceedings in equity were instituted. Mrs. Church's title was legal, whether we take that which she derived by the will or that which she derived by the deed. It is true in the one case she occupied the position of a mere volunteer, and in the
90 other of a purchaser, and in the latter case, if for value and without notice of the trust, not bound by it. But in either case the matters relied upon by the plaintiffs were equitable and properly, if not only, determinable in a court of equity. The defendants, in the former suit could not prevent their legal title from being drawn into such court for the purpose of charging it with an equity subsisting in these plaintiffs. In fact, when Mrs. Ruland sought to enforce this trust through the medium of an ejectment, it was earnestly contended by Judge Woodward, as counsel for the Churches, that she ought to have gone into the equity courts, and not subjected the determination of the case to twelve unlearned chancellors. (Church *vs.* Ruland, 14 P. F. Smith 432.) And now when that course has been pursued, it hardly lies in the mouth of the same party, by new counsel, to say that only in a common law court can this matter be determined, because on one side a legal title is relied upon.

If there were legal titles on both sides or if the dispute were over

the legal title the objection now raised might be good; but it must be constantly borne in mind that the plaintiffs relied solely upon an equity, and that proceedings to enforce this were necessarily equitable, whether pursued in a court of equity or set up in an equitable ejectment.

Moreover, the plea of being a purchaser for value without notice is equitable and not legal in its nature. It is simply the assertion of a superior equity (Cf. Story Eq. Juris., §§ 64 *c.*, 165, 381, 434, 630, 631, 1502, 1503; Story Eq. Pl., §§ 603 to 604 *a.*, 805 to 810, and Williams *vs.* Lambe, 3 Brown Ch., 264 (Perkin's Ed.), and N. 1), and is, I believe, never heard of in a court of law, except where the distinction between legal and equitable rights has been done away with. At all events, it is a doctrine purely equitable in its origin, being usually invoked as an offset to another equity or to protect the legal as against an equitable title, which would otherwise prevail,
91 and in some cases has been allowed in support of an equitable as against a legal title or demand.

The whole fabric of the argument of defendants' counsel must therefore fall. There is no constitutional barrier against their equity, to wit, the fact (if fact it be) of having paid value without notice, by which Mrs. Church's title under her deed might be supported, being tried and determined in the former equity proceedings. The decree in those proceedings, as we have seen, in effect disposes of her whole title to forty-nintieths (40.90) of this land, whether held by her by devise or deed, and it being within the power of that court to so ordain, the decree must here and now be recognized and enforced.

The exceptions on the part of the defendants are overruled and the report of the master (excepting his finding of fact on the question of notice to Mrs. Church) is confirmed.

Let an order be drawn referring the case to the same learned master and two commissioners to make partition between the parties, according to their respective interests, in pursuance of the act of Assembly.

April 16th, 1885.

R. W. ARCHIBALD,
Additional Law Judge.

VII.

Decree.

Now, to wit, January 21st, 1886, this cause came on to be further heard on exceptions to the report of the master and commissioners, to whom the same was referred for the purpose of partitioning the land described in the bill between the plaintiffs and defendants at this term, and was argued by counsel; and thereupon, upon due consideration thereof, it is ordered, adjudged, and decreed as
92 follows, viz: That the exceptions to the said report be, and the same are hereby, dismissed, and the said report is approved and confirmed; and it is further decreed that the partition of the land made by the master and commissioners aforesaid between

the plaintiffs and defendants be and remain firm and stable forever, and that the respective parties hold the purparts severally allotted to them and described in the report of the commissioners, unto them, their heirs and assigns, in severalty forever, and that the purpart awarded to Charles Church, minor son and heir of Charlotte Church, deceased, shall be subject to the rights of Joseph Church, as tenant, by the courtesy therein.

And it is further ordered, adjudged, and decreed that the said Joseph Church and Charles Church, by his guardian, Joseph Church, shall execute and file in the office of the prothonotary of said county, within ten days from the date of filing this decree, a good and sufficient deed in fee-simple to the said plaintiffs for the purpart of said land, awarded to them by the said master and commissioners, describing the same by metes and bounds, such conveyance being requisite for vesting in the said plaintiffs a complete legal title to the said purparts allotted to them; and it is further ordered, adjudged, and decreed that the costs in this case, with an allowance of one hundred and fifty dollars to the plaintiffs for counsel fees, which is hereby adjudged to be reasonable allowance, and is hereby taxed as a part of said costs in pursuance of the act of Assembly in such case made and provided, shall be paid by all the parties in proportion to their several interests, to wit: Four-ninths of the said costs to be paid by the said plaintiffs and five-ninths of said costs to be paid by the said defendants.

By the court.

93 *Docket Entries. No.* 341.

In the Supreme Court of Pennsylvania in and for the Eastern District. January Term, 1886.

Appeal of Joseph Church and Charles J. Church, minor son and heir of Charlotte Church, deceased, from decree in suit in equity wherein said appellants and plaintiffs and Helen M. Kelsey *et al.* are defendants.

A. H. Winton, A. Ricketts.

Among the records it is thus contained:

Certiorari to the court of common pleas of the county of Lackawanna, returnable the fourth Monday of February, 1886; exit February 5, 1886.

February 24, 1886.—Assignments of error filed.

February 23, 1886.—Record returned and filed.

April 15, 1886.—Argued,

May 31, 1886.—And now, thirty-first day of May, 1886, with the modification of ordering the deed to be executed and filed in the office of the prothonotary of said county within twenty days from this date, the decree is affirmed and the appeal dismissed at the costs of the appellants.

Per curiam.

June 3rd, 1886.—Remittitur exit and, with record, sent to H. W. Palmer, Esq.

94 *Præcipe and Affidavit.*

JOSEPH CHURCH and CHARLES J. CHURCH, Minor Son and Heir of Charlotte Church, Deceased, Appellants,
v.
HELEN M. KELSEY, CYRENUS WISE, and ANN WISE, his Wife, in right of said Ann; Sidney Philip Stevens, Letta Ann Ruland, L. T. Brown, and Roselle, his Wife, late Rozelle Stevens, in right of said Rozelle; F. E. Medway and Jennie, his Wife, in right of said Jennie; Lillie Stevens, Zelda Stevens, Caleb Wright, Samuel Linn, Isaac P. Hand, Henry W. Palmer, C. F. Williams, Elisha Griffin, and J. McKiel Stevens, Appellees. } No. 5.

Surwrit of certiorari surappeal in equity to the court of common pleas, sitting in equity for the county of Lackawanna, of January term, 1883.

Issue writ of certiorari surappeal in equity to the court of common pleas, sitting in equity for the county of Lackawanna, to remove record and proceedings in a certain action in said court, No. 5, January term, 1883, in which the said appellees are plaintiffs and the said appellants are defendants.

Returnable to next term, *sec. reg.*

A. H. WINTON,
A. RICKETTS,
Counsel for Appellants.

To Charles S. Greene, Esq., proth'y sup. c't.

95 COUNTY OF LACKAWANNA, *ss:*

Joseph Church, being duly sworn, saith the writ of certiorari applied for and purchased in above-entitled case is not intended for delay.

JOSEPH CHURCH.

Sworn and subscribed this fourth day of February, A. D. 1886.

[SEAL.] THOS. H. DALE,
Prothonotary.

Bond.

JOSEPH CHURCH and CHARLES J. CHURCH, Minor Son and Heir of Charlotte Church, Deceased, Appellants,

vs.

HELEN M. KELSEY, CYRENUS WISE, and ANN WISE, his Wife, in right of said Ann; Sidney Philip Stevens, Letta Ann Ruland, L. T. Brown, and Rozelle, his Wife, late Rozelle Stevens, in right of said Rozele; F. E. Medway, and Jennie, his Wife, in right of said Jennie; Lillie Stevens, Zelda Stevens, Caleb E. Wright, Samuel Linn, Isaac P. Hand, Henry W. Palmer, C. F. Williams, Elisha Griffin, and J. McKiel Stevens, Appellees. } No. 5. In Equity.

Surwrit of certiorari to the court of common pleas for the county of Lackawanna, of January term, 1885.

96 We, Joseph Church, Wade M. Finn, and Geo. M. Watson, of Lackawanna county, Pennsylvania, severally acknowledge to owe the above-named appellees the sum of one thousand ($1,000) dollars upon condition that the above-named appellants prosecute their writ of appeal with effect, and, if the decree be affirmed or the writ of certiorari be discontinued or non-prossed, that they pay the debt, damages, and costs adjudged or accruing upon such decree, and all other damages and costs that may be awarded upon such writ of certiorari, and for the return to the court below of the record with the remittitur, or else we will do it for them.

JOSEPH CHURCH.
W. M. FINN.
G. M. WATSON.

Taken and acknowledged this fourth day of February, A. D. 1886.
[Seal of the Court of Common Pleas of Lackawanna County.]

THOS. H. DALE,
Prothonotary.

Endorsements: 341. Jan. T., 1886. Appeal of Joseph Church and Charles J. Church, minor son and heir of Charlotte Church, deceased. *Præcipe*, affidavit, and recognizance. Filed Feb. 5, 1886.

97 *Assignments of Error.*

In the Supreme Court of Pennsylvania, Eastern District. No. 341. January Term, 1886.

Appeal of Joseph Church and Charles J. Church, minor son and heir of Charlotte Church, deceased.

It is respectfully submitted that the learned court erred in the following particulars, to wit:

1. In ruling that complainants had maintained the title set forth

in their bill, and were entitled to the partition for which they prayed.

2. In ruling that partition could be decreed against the adverse possession of the respondents.

3. In ruling that the respondent, Joseph Church, was not entitled to a hearing upon his defence of *bona fide* purchase for value without notice.

4. In ruling that the court of common pleas of Lackawanna county, sitting in equity, had jurisdiction of this bill partition.

5. In ruling that the court could properly proceed without having all parties interested in the lands before it.

6. In decreeing partition and the execution of conveyance by the respondents herein.

A. RICKETTS,
A. H. WINTON,
Counsel for Appellants.

98 Endorsements: No. 341. January term, 1886. Supreme court of Pennsylvania. Appeal of Joseph Church *et al.* Assignments of error. Filed Feb. 24, 1886.

STATE OF PENNSYLVANIA, } ss:
Eastern District, }

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania, in and for the eastern district, do hereby certify that the above and foregoing is a true copy of the docket entries, *præcipe*, bond, affidavit, and assignments of error, and the record in the above-entitled case, so full and entire as the same remains of record in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Philadelphia, this 14th day of September, in the year of our Lord one thousand eight hundred and eighty-six (1886).

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary of Supreme Court of Pennsylvania, Eastern District.

99 Know all men by these presents that we, Joseph Church, Charles J. Church, W. M. Finn, & G. M. Watson, all of Luzerne county, State of Pennsylvania, are held and firmly bound unto Helen Kelsey, Cyrenus Wise and Ann, his wife; Sidney Philip Stevens, Letta Ann Ruland, L. T. Brown and Rozelle, his wife; F. T. Medway and Jennie, his wife; Lillie Stevens, Zelda Stevens, Caleb E. Wright, Samuel Linn, Isaac P. Hand, Henry W. Palmer, C. F. Williams, Elisha Griffin, and J. McKiel Stevens in the full and just sum of five hundred dollars, to be paid to the said obligees or their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twentieth day of December,

in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately at a term of the supreme court of Pennsylvania, being the highest court of the said State, in a suit depending in said court between the said obligees and the said Joseph Church and Charles J. Church, a decree was rendered against the said Joseph Church and Charles J. Church, and the said Joseph Church and Charles J. Church having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said obligees, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Joseph Church and Charles J. Church shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

JOSEPH CHURCH. [SEAL.]
CHARLES J. CHURCH. [SEAL.]
W. M. FINN. [SEAL.]
G. M. WATSON. [SEAL.]

Sealed and delivered in the presence of—
B. M. WINTON.

Approved by—

ULYSSES MERCUR,
Chief Justice of Supreme Court of Pennsylvania.

January 3d, 1887.

100 [Endorsed:] Supreme Court U. S. October term, 1886. No. 1302. Joseph Church *et al.*, plff's in error, *vs.* Helen M. Kelsey *et al.* Writ of error bond.

[Stamped:] Office Supreme Court U. S. Filed Jan. 12, 1887. James H. McKenney, clerk.

Endorsed on cover: Pennsylvania supreme court. No. 1302. Joseph Church & Charles J. Church, plaintiffs in error, *vs.* Helen M. Kelsey, Cyrennes Wise and Ann Wise, his wife; Sidney Philip Stevens, Letta Ann Ruland, L. T. Brown & Rozelle, his wife, *et al.* Filed December 1, 1886.

121-282

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 1302.

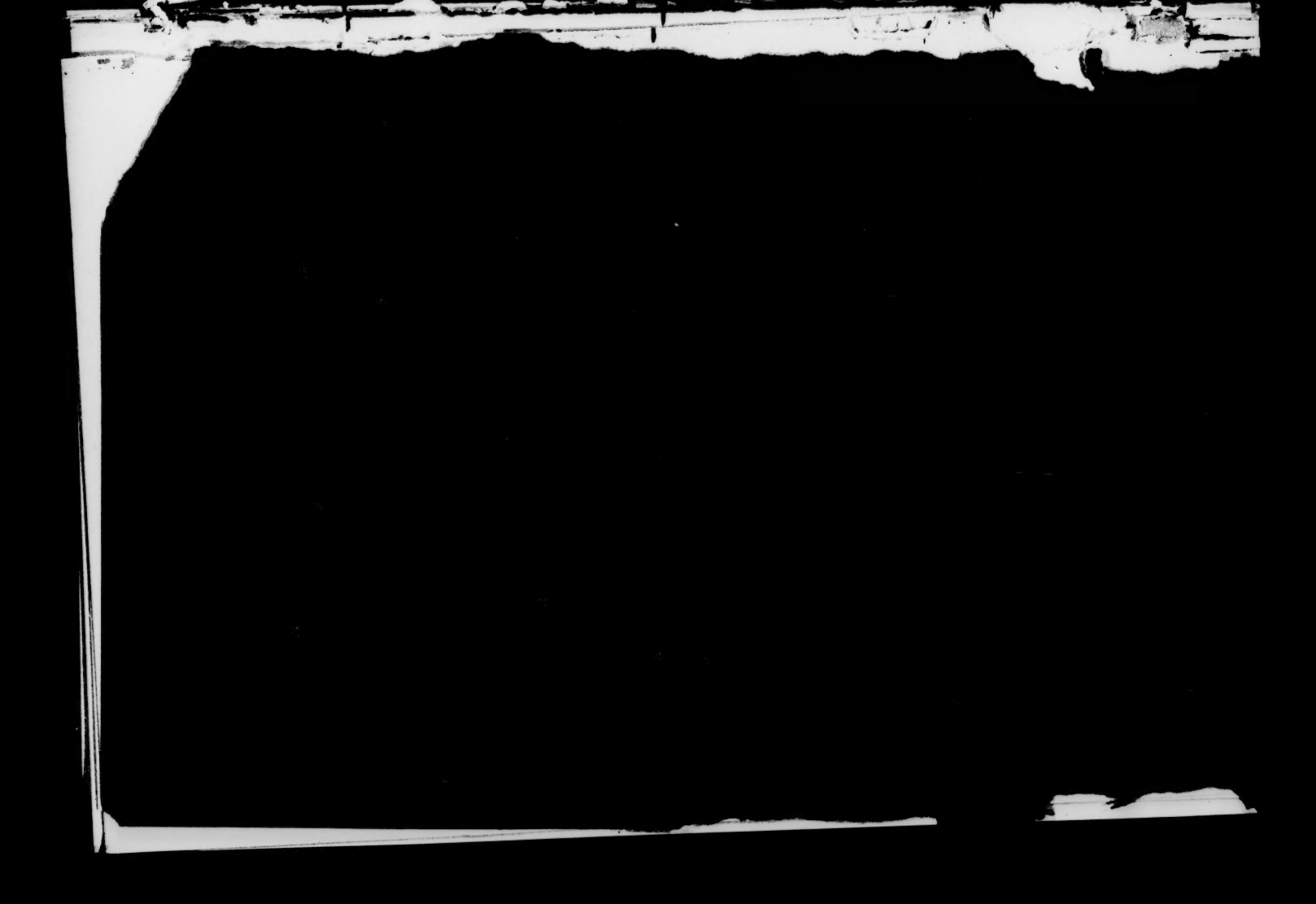
JOSEPH CHURCH and CHARLES J. CHURCH,
Plaintiffs in Error,

vs.

HELEN M. KELSEY, CYREMUS WISE and ANN WISE, his wife, SIDNEY PHILIP STEVENS, LETTY ANN RULAND, L. T. BROWN and ROZELLE his wife, *et al.*
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

Lambert, Print, 104 Public Square, Wilkes-Barre.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.
No. 1302.

JOSEPH CHURCH and CHARLES J. CHURCH,
Plaintiffs in Error,

vs.

HELEN M. KELSEY, CYREMUS WISE and ANN WISE, his wife, in right of said wife, SIDNEY PHILIP STEVENS, LETTY ANN RULAND, L. T. BROWN and ROZELLE his wife, late ROZELLE STEVENS, in right of said ROZELLE, F. E. MEDWAY, and JENNIE his wife, in right of said wife, ZELDA STEVENS, CALEB E. WRIGHT, SAMUEL LINN, ISAAC P. HAND, HENRY W. PALMER,

C. F. WILLIAMS, ELISHA GRIFFIN and J. MCKIEL STEVENS, *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

Upon motion to dismiss writ of error, for want of jurisdiction, because there is no Federal question involved in said cause; or if the writ of error shall not be dismissed, that the decree of the Supreme Court of the State of Pennsylvania be affirmed, on the ground that although in the opinion of this Court the record may show that this Court has jurisdiction, it is manifest that said writ of error was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

STATEMENT OF CASE, AND BRIEF OF ARGUMENT, AGAINST THE MOTION, ON PART OF PLAINTIFFS IN ERROR.

Joseph Church was a citizen of the State of Wisconsin. He had married Charlotte Stevens the niece and foster-daughter of one Letta Griffin of Pennsylvania. Eight or ten days after the birth of said Charlotte her mother died, and on her death-bed committed her infant to the care of her sister Letta, who assumed the same, and reared the child to womanhood, so that the relation between Charlotte

and her aunt Letta was practically that of mother and daughter.

The land in question in this case, was devised to Letta Griffin by her father, and after his death she entered into the full and unquestioned possession of it, and exercised over it all the rights of absolute ownership. She conveyed lots, reserved to herself the coal and minerals, settled land damages, and conveyed rights of way, without any one questioning her right so to do, although her nephews and nieces,—who after her death set up the claim which caused the present litigation, and who now themselves in part, and their assigns in part, are the present defendants in error,—lived all around her and knew of her thus treating the property. Among other conveyances was one of a lot to a Mrs. Louisa Marsh one of the very Stevens heirs, the litigants in this case. At one time she conveyed away the whole of the property except a one-half acre; the purchaser failing to pay she was compelled to proceed on the bond and mortgage given, and recover the land. During all these transactions, and during all the life of Letta, no one objected, nor claimed that she had not a perfect right so to deal with the property as her own, and dispose of it as she pleased.

The land was unproductive, and Letta Griffin became involved in debt, which began to harass her. She therefore applied to Joseph Church to leave his home and business in Wisconsin and come to Pennsylvania and take this property off her hands, she proposing to sell it to him in consideration of his paying off her debts, taking care of her during her life, and after her death burying her respectably, and paying the several legacies she had given in her will to her nephews and nieces known as the Stevens children. Upon examination of these matters, Church assented to the proposition, and purchased the property. He paid her debts and took care of her during her life, and after her death properly buried her, and

offered to pay the legacies in her will to the Stevens children. They refused to receive them and then for the first time informed Church that they claimed that Letta Griffin was their trustee for one-half the lands.

Church after taking possession of the property expended altogether in improving it about thirty thousand dollars, part before and part after Letta Griffin's death.

The Stevens heirs brought ejectments to enforce their claims. Subsequently they filed a bill in equity for the same purpose, and to have Charlotte Church, as devisee of Letta Griffin, charged with a trust in their favor, alleging that Letta Griffin had promised her father that she would devise half the land he devised to her, to them, and that she had obtained the devise to herself upon this promise. After they had filed their bill in equity, Church set their ejectments down for trial, whereupon they took non-suits in the several cases. They obtained a decree in the equity proceeding, declaring Charlotte Church as a devisee under the will of Letta Griffin, a trustee as to four-ninths of the property for them, and requiring her to make to them a conveyance according to their several interests in the said four-ninths. She died just after the decree was served upon her without having executed any conveyance, whereupon the suit abated, and the land descended to her son Charles J. Church subject to the curtesy of her husband Joseph Church, these being the present plaintiffs in error..

Instead of reviving the suit and obtaining a decree against the heir the said Charles J. Church and the enant by the curtesy Joseph Church, they, the plaintiffs there, defendants in error here, just assumed that they were fully invested with the title and possession, by reason of the said decree, and filed a bill in Equity for partition, alleging themselves to be *tenants in common in fee.* And they set forth as their title, simply the said proceeding in Equity and the decree therein made. To this the

defendants made answer denying that said proceeding in Equity vested any title in the complainants, also denying that the complainants were tenants in common with defendants, and declaring that they held the lands by a legal title purchased *bona fide*, for a valuable consideration, without notice of the trust claimed, and that by virtue of said purchase they had received the possession in 1867 and continuously held it adversely ever since; and also averring that under these circumstances, they had the right guaranteed to them both by the Constitution of the State and that of the United States to have, hold and maintain their title to the land regularly at law.

The proofs conformed to the pleadings. The plaintiffs, there simply put in evidence the record of the said suit in Equity, and claimed that although the suit had abated by the death of Charlotte Church whom the decree declared the trustee, and the decree had never been executed, yet the simple fact that such decree had been pronounced, fully vested in them the title and possession, so that they were in position to claim that there were thereby made *tenants in common in fee*, and entitled to partition.

The defendants, the present plaintiffs in error, proved the purchase of the land from Letta Griffin, for a valuable consideration, *bona fide*, without notice of any kind of the trust claimed; they also showed that the possession had been given in consequence of such purchase, and that they had held it for sixteen years continuously, openly, notoriously, exclusively and adversely to the plaintiffs as well as to others. They showed that this was well understood by the plaintiffs there, by putting in evidence the ejectments they had brought, in which they declared the defendants to be in such possession, and themselves out of possession.

The said defendants claimed that the plaintiffs could not maintain their action of partition because they had shown neither title, nor possession, nor right of possession, for the reasons,

First, that the record of the said suit in equity was not evidence of a valid litigation and settlement of the title to the land, inasmuch as the Court sitting in Equity had no power to hear and determine the matters involved in such litigation, and therefore that whole proceeding was *coram non judice* and void; and to recognize it as valid; and a legitimate decision of the title to the lands, was to violate the provisions of the v. and xiv. Amendments to the Constitution of the United States, providing that no person should be deprived of his property without due process of law, nor denied the equal protection of the laws; and also, the 9th and 11th sections of the bill of rights of the Constitution of the State of Pennsylvania, providing that no one can be deprived of his property unless by the judgment of his peers, or the law of the land, and that remedy shall be by due course of law.

Second, that the record of the suit in equity as it stood abated, was not sufficient evidence that the title of plaintiffs in error had been devested, and vested in the defendants in error, so as to make them tenants in common in fee with plaintiffs in error.

Third, that the said record was not evidence that the possession of the premises had been taken from plaintiffs in error and transferred to the defendants in error, and especially not, in view of the plain direct testimony in the cause to the contrary.

They also contended that the case as presented by the defendants in error in their bill for partition was not one within the jurisdiction of the Court sitting in equity. And further, that to maintain their bill, would be to proceed in defiance of the fundamental contract made between the collective body of the citizens of the State and each individual citizen, in the Constitution of the State, and thus impair the obligation of the said contract, and thus violate Section X of Article first of the Constitution of the United States.

It will be seen that this constitutional defence was presented hy plaintiffs in error in the very first pleading filed by them, to wit, their answer to the bill, and thus made the basis of their defence throughout the whole case; see transcript of record, p. 7. Also that this defence was insisted upon throughout the case; see transcript of record, p. 8, where it was presented as objection to the evidence; and p. 46 where it is presented in the 4th, 5th, 6th and 7th exceptions to the Master's report. And that it was presented in argument before the Court appears from the language of the Court in its opinion, p. 55, transcript of record.

There is a statute in Pennsylvania, which some deem unfortunate, by which the Supreme Court of that State is not required to file an opinion when they affirm the judgment of the Court below. In the present case no opinion was filed, but this constitutional defence was there strongly urged under the 1st and 4th assignments of error, which will be found on pp. 58 and 59 transcript of record.

We submit tnat in affirming the ruling of the Court below, that the complainants in the bill for partition, the defendants in error here, had maintained the title set forth in their bill, and that they were entitled to the partition for which they prayed, and in thus declaring that the record of the suit in Equity No. 3, January Term, 1872, in the Court of Common Pleas of Luzerne county, was conclusive evidence of title and possession in the said complainants; and in affirming the ruling of the Court below, that the said Court had jurisdictiion of the bill in partition; the Supreme Court of the State erred, because the said decision was against the rights and privileges guaranteed to plaintiffs in error by the V and XIV amendments to the Constitution of the United States, and by Section X of Article I of said Constitution.

And we submit that this is a question within the juris-

diction of this Court, because its correct decision depends upon the construction of these provisions of the Constitution.

Cohens v. Virginia, 6 *Wheat.* 246, 379.

Worcester v. Georgia. 6 *Peters* 515.

In order that the decree in the Equity case No. 3, January Term, 1872, in Common Pleas of Luzerne county, should have the validity accorded to it in this case, the Court pronouncing that decree must have been a competent tribunal to pass upon the subject matter of the suit.

Pennoyer v. Neff, 95 *U. S.*, 714.

And we submit that it was not such competent tribunal. As said by one of the Judges of the Supreme Court of Pennsylvania, Equity powers have been doled out to the Courts by the Legislature with a sparing hand. As Courts sitting in Equity they have but limited jurisdiction, and have never been invested with the full powers of the Court of Chancery in England. It has been distinctly and clearly declared by the Supreme Court of that State, that orders and decrees in Equity, where there is no jurisdiction are simply *coram non judice* and void.

Grubb's Appeal, 90 *Pa. St. R.*, 228, 235.

The bill in the said No. 3 January T., 1872, was filed to charge a devisee with a trust in favor of the complainants therein, on the ground that they were defrauded by the testatrix of the said devisee. That the Courts of Equity have not general jurisdiction to grant such relief is expressly decided by this Court, in the *Case of Broderick's Will*, 21 *Wall.*, 503, which decision has been approvingly cited in *Gaines v. Fuentes*, 92 *U. S.* 10, 21.

Moreover in Pennsylvania, the Act of Assembly of April 22d, 1856, §7. *Pamph. L.* 533, *Purd. Dig.* 509, *pl.* 12, expressly provides as follows, to wit, "The probate by the "register of the proper county of any will devising real

"estate shall be conclusive as to such realty, unless within "five years from the date of such probate, those interested "to controvert it shall, by *caveat* and action at law duly "pursued, contest the validity of such will as to such "realty: *Provided*, that all persons who would be sooner "barred by this section taking immediate effect, shall not "be thereby barred before two years from the date "thereof."

This Act has received judicial construction by the Supreme Court of the State, and it is declared that in that State, a will can only be contested in the manner prescribed by that Act, and that is by "*caveat* and *action at* "*law* duly pursued."

Wilson v. Gaston, 92 *Pa. St. R.*, 207.

Cochran v. Young, 104 *Pa. St. R.*. 333.

It is therefore clear that the Court sitting in Equity, having neither general jurisdiction to hear and determine the subject matter presented before it in the said case No. 3 January term 1872; and the jurisdiction to hear and determine the said subject matter having been exclusively vested in the probate judge, subject only to contest in the way prescribed by the Act of Assembly aforesaid, to wit, by caveat and *action at law*,—it is clear that the decree pronounced in that case was wholly unauthorized, and was not a proceeding under due process of law, but was a mere arbitrary exercise of an unlawfully assumed power.

2. The title of plaintiffs in error was and is purely legal. The conveyance was made by Letta Griffin to Charlotte Church, but the purchase money was wholly paid by Joseph Church her husband; whether the title is to be considered in her or him is immaterial; in either case it was simply legal. When she died, whatever title she had, descended to her son and heir, subject to the curtesy of her husband. And by the descent thus cast,

the title became so vested that it could only be devested by a proper action at law.

Gilbert on Tenures, 18. *Co. Litt.*, 237 *a Sect.*, 385.

This is the law of Pennsylvania.

Hoey v. Furman, 1 *Pa. St. R.*, 295, 300.

The right to have and enjoy this legal title unless deprived of it by a regular action at law, is a right which the Supreme Court of Pennsylvania have declared no power in the state could take from them. In *North Pa. Coal Co. v. Snowden*, 42 *Pa. St. R.*, 488, 492, the Court through Justice Strong, afterwards a Justice of this Court, declares as follows, to wit:

"It is true, the legislature are authorized to vest in the "Courts such powers (beyond those enumerated), to grant "relief *in Equity*, as shall be found necessary (art. 5, §6) "but this must be understood as referring to powers in "equity cases, in that class of cases of which chancery had "jurisdiction. Such an understanding is necessary to "make the different parts of the constitution consistent "with each other and to give effect to all. It cannot mean "that the legislature may confer upon the Supreme Court "and the Courts of Common Pleas, the power of trying ac- "cording to the course of chancery, any question which "has always been triable according to the course of law "by a jury. If it can, then an ejectment founded solely "on legal title, an action of debt on bond, or a replevin, "or an action of trespass, may be sent into chancery, all "contested facts in it be decided by the Judge, and the "intervention of a jury be unknown.

"Then, what has become of the constitutional right of "the citizen? Such a doctrine would startle the people "of this Commonwealth, and justly, for it would deprive "them of one of their most valued privileges. No power "in our government can take from the litigant the right "to have his case tried by a jury, substantially in the "mode and with the same effect as that which belonged

"to jury trials in similar cases, when the Constitution of "1776 was adopted. What is law and what is equity, is "a judicial question. It belongs, therefore, exclusively to "the judiciary. But, were it admitted that the legisla- "ture could authoritatively convert a legal right into an "equitable one, a Court of equity could not, as such, en- "force it. The judiciary, no more than the legislature, "can deny to any litigant the right of trial by jury, in a "case appropriate to such a mode of trial."

This decision has not only never been questioned nor impaired, but on the contrary has been repeatedly in the fullest manner approved.

Norris' Appeal, 64 *Pa. St. R.*, 275.
Tillmes v. Marsh, 67 *Id.*, 507.
Haines' Appeal, 73 *Id.*, 169.
Grubbs' Appeal, 90 *Id.*, 228.

Therefore, if the Legislature could not lawfully confer such power upon the Court sitting in Equity, the said Court not lawfully assume such power.

3. That the plaintiffs in error, had the adverse possession of the lands from 1867, the time of the purchase from Letta Griffin, down to the time of this suit in partition, was not disputed. Therefore the law of Pennsylvania is clear that there was no jurisdiction in partition.

Law v. Patterson, 1 *W. & S.*, 184.
Longwell v. Bentley, 3 *Grant*, 177.
McMasters v. Carothers, 1 *Pa. St. R.*, 325.

In this last case it is distinctly stated that the common possession alone gives jurisdiction in partition. The learned Court of the Common Pleas, whose decision was simply affirmed by the Supreme Court, admitted this, and that therefore there would be no jurisdiction to maintain a partition at law; but seemed to think that the fact of

these obstacles at the law, simply furnished occasion for assuming jurisdiction in equity, for the very purpose of overcoming the obstacles thus insurmountable at the law; see p. 50 f. 84, transcript of record.

The Act of Assembly undoubtedly gives jurisdiction in equity in Pennsylvania in cases of partition. But it must be in cases of *partition;* it cannot be construed to extend the jurisdiction beyond the limits of the law, and to bring cases within the jurisdiction in partition in equity, which the law declares are not within the jurisdiction in partition.

Therefore we submit that the assuming jurisdiction in this case, was also, as well as that in No. 3 January term, 1872, an arbitrary exercise of an unlawfully assumed power, and a violation of the Constitutional rights of the plaintiffs in error.

4. We submit that the proceedings in this case in the State Court were in violation of that fundamental contract made by the collective body of the citizens as a State, with each individual citizen, in the Constitution. It cannot well be gainsaid that when the barons at Runingmede wrung from King John the concession, *nulli vendemus, nulli negabimus aut differemus rectum aut justitiam,* that this was a contract between the sovereign and his subjects. So the provisions of the Constitution of Pennsylvania are contracts with each citizen. While each citizen must submit to the jurisdiction of the Courts whether at law or equity, when acting in their legitimate spheres, at the same time the Constitution is a contract with him, that they shall not go beyond their spheres, and assume or exercise any powers not lawfully delegated to them. The Constitution is an express contract with these plaintiffs in error, that they shall not be deprived of their property except by the judgment of their peers or the law of the land. To permit the proceedings in this case to be successful, is we submit, to permit the enactment of a law

by judicial legislation, impairing the obligation of the said contract.

5. We are a little surprised at the proposition in support of the motion in this case, that an express reference to the clauses of the Constitution upon which we relied, should have been made in our pleadings. For answer thereto we cite the language of this Court in *Bridge Proprietors v. Hoboken L. & I. Co.*, 68 *U. S.*, 116, as follows, to wit:

"It is objected however, by the defendants, that the "pleadings do not, in words, say that the statute is void "because it conflicts with the Constitution of the United "States, and do not point out the special clause of the "Constitution supposed to render the Act invalid."

"It would be a new rule of pleading and one altogether "superfluous, to require a party to set out specially the "provision of the Constitution of the United States, on "which he relies for the action of the Court in the pro-"tection of his rights. If the Courts of this country, and "especially this Court, can be supposed to take judicial "notice of any thing without pleading it specially, it is "the Constitution of the United States. And if the plain-"tiff and defendant, in their pleadings, make a case which "necessarily comes within some of the provisions of that "instrument, this Court surely can recognize the fact "without requiring the pleader to say in words: "This "paragraph of the Constitution is the one involved in this "case."

And it is evident from the fifth proposition in support of the motion, that our claim is wholly misunderstood. As we have above pointed out, it is not based upon Article VII. of the Amendments to the Constitution, but upon Articles V. and XIV. of the said Amendments, and Section X. of Article I. of the Constitution. We agree that where there is regular process instituted by a State for the settlement of disputes, and a competent tribunal,

there is due process of law. But the very point of our complaint is that our land has been taken from us by a tribunal that was not competent, and by a process not authorized by the laws of the State. To illustrate; by statute in Pennsylvania, Justices of the Peace are given jurisdiction in certain cases of trespass; but if the defendant makes affidavit that the title to the land will come in question, then the justice is required to dismiss the case. If in case of such affidavit by defendant, the justice should refuse to dismiss the case, and proceed to render a judgment, and this should be simply affirmed by the higher Courts, and execution should be issued depriving a defendant of his lands, could it be contended that this was not a violation of such defendant's Constitutional rights? If the same thing is done by judicial officers of a higher rank, where is the difference?

Finally, we submit that the aforesaid proceedings in the State Courts, were the arbitrary exercise of assumed powers, and in clear violation of the rights of plaintiffs in error under the clauses of the Constitution above mentioned, and that this Court has full jurisdiction to protect us and correct the wrong thus done us. In *Marbury v. Madison*, 1 *Cranch*, 137, 163, this Court through Ch. J. Marshall says:

"The very essence of civil liberty certainly consists in "the right of every individual to claim the protection of "the laws whenever he receives an injury." And in the same case, at pp. 176-7, "To what purpose are powers "limited, and to what purpose is that limitation com- "mitted to writing if these limits may at any time, be "passed by those intended to be restrained? The dis- "tinction between a government with limited and un- "limited powers is abolished, if those limits do not con- "fine the persons on whom they are imposed, and if "acts prohibited and acts allowed, are of equal obliga- "tion."

The XIV amendment was evidently intended to enlarge the rights and increase the protection of the individual citizen, and was passed becaused the V was not deemed sufficient. It expressly declares the citizen, to be a "citizen of the United States," as well as of the State where he resides. And we think the decisions of this Court fully sustain our claim.

Martin v. Hunter's Lessee, 1 *Wheat.*, 305.

Tennessee Davis, 100 *U. S*, 257.

Yick Wo. v. Hopkins, 118 *U. S.*, 356, and cases therein cited.

It was the glory and strength of the Roman Empire that even a Jewish prisoner, in a distant province, could stay the hand of a proud chiliarch by the simple declaration that he was a Roman Citizen: and by the same statement make officers at Philippi tremble because they had violated the law. When the rights of the individual citizen ceased to be so regarded and guarded, the strength and glory of that Empire departed. And there is for us in this a profitable lesson.

Respectfully submitted,

A. RICKETTS,
Counsel for Plaintiffs in Error.

121-282

IN THE
Supreme Court of the United States.

No. 1302.

JOSEPH CHURCH AND CHARLES J. CHURCH, MINOR SON AND HEIR OF CHARLOTTE CHURCH, DECEASED, Plaintiff's in Error.

vs.

HELEN M. KELSEY, CYRENUS WISE AND ANN WISE, his wife, in right of said Ann, Sidney Philip Stevens, Letta Ann Ruland, L. T. Brown and Rozelle, his wife, late Rozelle Stevens, in right of said Rozelle, F. E. Medway and Jennie his wife, in right of said Jennie Lillie Stevens, Zelda Stevens, Caleb E. Wright, Samuel Linn, Isaac P. Hand, Henry W. Palmer, C. F. Williams, Elisha Griffen, and J. McKiel Stevens, Defendants in Error.

ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

CHAPIN BROWN,
Solicitor for Defendants in Error.

JUDD & DETWEILER, PRINTERS.

IN THE

Supreme Court of the United States.

No. 1302.

JOSEPH CHURCH AND CHARLES J. CHURCH, MINOR SON AND HEIR OF CHARLOTTE CHURCH, DECEASED, Plaintiff's in Error.

vs.

HELEN M. KELSEY, CYRENUS WISE AND ANN WISE, his wife, in right of said Ann, Sidney Philip Stevens, Letta Ann Ruland, L. T. Brown and Rozelle, his wife, late Rozelle Stevens, in right of said Rozelle, F. E. Medway and Jennie his wife, in right of said Jennié Lillie Stevens, Zelda Stevens, Caleb E. Wright, Samuel Linn, Isaac P. Hand, Henry W. Palmer, C. F. Williams, Elisha Griffen, and J. McKiel Stevens, Defendants in Error.

ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

Come now the defendants in error and move the Court to dismiss the writ of error in this cause for want of jurisdiction, because there is no Federal question involved in said cause; or if the writ of error shall not be dismissed, that the decree of said supreme court of the State of Pennsylvania be affirmed, on the ground that although in the

opinion of this court the record may show that this court has jurisdiction, it is manifest that said writ of error was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

CHAPIN BROWN,
Counsel for Defendants in Error,
for the purposes of this motion.

To A. RICKETTS, ESQ., *Counsel for Plaintiffs in Error.*

Please take notice, that on the 7th day of March, A. D. 1887, the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States, for the decision of the Court thereon.

Annexed hereto is a copy of our brief or argument in support of said motion.

CHAPIN BROWN,
Solicitor for Defendants in Error,
for the purposes of this motion.

BRIEF OR ARGUMENT IN SUPPORT OF MOTION TO DISMISS.

I. This is a suit for partition, and equity courts have, under the laws of the State of Pennsylvania, jurisdiction to try suits of this nature.

The act of 17th March, 1848, provides that "the court of common pleas of Philadelphia county shall have all the power and jurisdiction of a court of equity in all cases of dower and partition within the city and county of Philadelphia."

Laws of Penna, 1845, paragraph IV, page 160.
Brightley's Purden's Digest (Pa.), vol. 1, p. 694, sect. 22.

And the act of 14th February, 1857, provides that "the courts of common pleas of the several counties of this Com-

monwealth, in addition to the power and jurisdiction heretofore possessed and exercised, shall have the same chancery power and jurisdiction which are now by law vested in the court of common pleas of the city and county of Philadelphia."

Laws of Penna., 1857, p. 39, sect. 1.
Brightley's Purden's Digest (Pa.), vol. 1, p. 692, sect. 8.
Brown's Appeal, 84 Pa., p. 457.

II. Under the 25th section of the judiciary act, where the jurisdiction of the Supreme Court of the United States is not shown upon the record, the writ of error will be *dismissed on motion.*

Sidney *vs.* Williamson, 20 Howard, 428.
Pearson *vs.* Yewdall, 5 Otto, 294.

III. It does not appear *from the record* that this Court has jurisdiction in this case. The only claim to any right asserted under the Constitution of the United States, is contained in the fifth (5th) section of the answer of the defendant below; but no clause of or any reference to any clause or article of the Constitution is set up in the record, and this should have been done. The Court is not able to see from the record that any provision of the Constitution of the United States was relied on by the plaintiffs in error, and that the right thus claimed by them was denied.

Maxwell *vs.* Newbold, 18 How., 511.
Lawler *vs.* Walker, 14 How., 149.
Farney *vs.* Towle, 1 Black, 350.
Hoyt *vs.* Sheldon, 1 Black, 518.
Bridge Proprietors *vs.* Hoboken Co., 1 Wall., 116.

IV. The court below did not, in this proceeding, attempt to try the title to land; that had been settled by previous litigation between the parties in which the plaintiffs were adjudged to own five-ninths, and defendants four-ninths of